Miller Index - Ark 2nd

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 131. 96

THE HANNIBAL AND ST. JOSEPH RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

LEWIS SMITH.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

FILED NOVEMBER 11, 1867.

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INDEX.

	Original.	Print.
Record of Circuit Court	1	1
Petition	2	1
Answer	4	2
Judgment	8	3
Bill of exceptions	8	4
Resolution board of directors	10	4
Massey's certificate	12	5
Willis's evidence	13	5
Certified list of lands	14	6
Wilson's certificate	15	6
Hendrick's certificate	16	6
Smith's certificate	18	7
Defendant's certificate of purchase, &c	19	7
Commissioner's report	21	8
Order of court, &c	23	9
John Smith's evidence	24	9
Map of land	30	11
Gelstrap's evidence	31	11
Wensill's evidence	32	11
Harrison's evidence	33	12
Sears's evidence	34	12
Laughlin's evidence	35	12
Rice's evidence	36	13
Roberts's evidence	37	13

	Original.	Print.
Green's evidence	38	14
Plaintiff's instructions	39	14
Defendant's instructions	46	16
Motion for new trial	48	17
Bond for appeal	51	18
Assignment of error	55	19
Judgment of Supreme Court	57	20
Opinion of Supreme Court	59	21
Bond for writ of error	84	28
Clerk's certificate	86	29
Citation	88	30
Writ of error	90	31
Assignment of error	91	31

Fees: Clerk's, for record, $41.50; paid by James Carr, attorney for plaintiff in error.

1 STATE OF MISSOURI, *ss*:

Be it remembered, that on the second day of August, A. D. 1866, there was filed in the office of the clerk of the Supreme Court of the State of Missouri, held at St. Joseph, Missouri, a transcript of the record of the Circuit Court within and for the county of Macon, and State aforesaid, of a cause therein, wherein the Hannibal and St. Joseph Railroad Company was plaintiff, and Lewis Smith, defendant, which said record is in the following words and figures, to wit:

STATE OF MISSOURI, *County of Macon*:

Be it remembered, that on the 30th day of March, 1863, there was filed in the office of the clerk of the Circuit Court of Macon county, in the State of Missouri, a petition in words and figures following, to wit:

2 In the Circuit Court of Macon county, March term, 1863.

Petition.

THE HANNIBAL & ST. JOSEPH RAILROAD Company, plaintiff,
vs.
LEWIS SMITH, defendant.

Plaintiff states that it is a corporation created under and by virtue of an act of the general assembly of Missouri, entitled An act to incorporate the Hannibal & St. Joseph Railroad Company, approved February 16, 1847, and the several acts amendatory thereof.

Plaintiff states that on the first day of October, 1855, it was entitled to the possession of the following described tracts of land, to wit: The northwest quarter of the northwest quarter, and the east half of the northwest quarter, and the northeast quarter of the southwest quarter of section twenty, in township fifty-eight, and range sixteen, situate in Macon county, in the State of Missouri; and being so entitled to the possession thereof, that the defendant's afterwards, on the 2nd day of Oct., 1855, entered into said premises and
3 unlawfully withholds from the plaintiff the possession thereof, to the damage of plaintiff in the sum of dollars. The plaintiff further states that the monthly value of the rents and proffits of said premises is dollars. Wherefore the plaintiff demands judgment for the recovery of said premises and dollars, for the unlawfully withholding of the same from plaintiff, and dollars, for monthly rents and proffits from the rendition of judgment until the possession of the premises is delivered to plaintiff, and for other proper relief.

JAMES CARR,
Att'y for Plaintiff.

Affidavit.

Sam'l W. Clapp, agent for plaintiff, makes oath and says, that the foregoing petition and the matters and things therein stated he believes to be true.

SAM. W. CLAPP.

Subscribed and sworn to this 30th day of March, 1863, before me.
WALTER T. GILMAN, *Cl'k.*

On the reverse of said petition is the following:

4 Petition in ejectment. H. & St. Jo. R. R. Co. *vs.* Lewis Smith. Filed March 30th, 1863. Walter T. Gilman, cl'k.

And afterwards, to wit, on the 29th day of September, 1863, at a regular term of the Macon Circuit Court, the defendant, Lewis Smith, by his att'ys, voluntarily filed his answer to plaintiff's petition, in words and figures following, to wit:

In the Macon Circuit Court, September term, 1863.

Answer.

THE HANNIBAL & ST. JOSEPH RAILROAD Company, pl'ff,
vs.
LEWIS SMITH, def't.

And now, at this day, comes the defendant, by his att'ys, and for answer to plaintiff's petition says, he denies that plaintiff was entitled to the possession of the premises described in pl'ff's petition at the time alleged, or at any other time since or prior thereto.

Def't denies that he unlawfully withholds from pl'ff the possession of the premises described in pl'ff's petition.

5 MARMADUKE & ESKRIDGE,
Def'ts Att'ys.

Lewis Smith, def't, makes oath and says the above answer and the matters therein as stated he believes to be true.

LEWIS SMITH.

Subscribed and sworn to before me Sept. 29th, 1863.
W. T. GILMAN, *Cl'k.*
By TOM HARPER, *D. C.*

On the reverse of said answer is the following, to wit:

Answer. H. & St. Jo. R. R. Co. *vs.* Lewis Smith. Filed Sept. 29th, 1863. W. T. Gilman, C., by Tom Harper, D. C.

And afterwards, to wit, at a regular term of said Circuit Court, begun and held on the 28th day of September, 1863, and continued on the 3rd day of October, 1863, the following appears of record, to wit:

H. & St. Jo. R. R. Co.
vs.
Lewis Smith.

Def't files answer, and cause is continued.

6 And afterwards, at a regular term of said court, begun and held on the 29th day of March, 1864, and continued on the 29th day of April, 1864, the following appears of record, to wit:

H. & St. Jo. R. R. Co.
vs.
Lewis Smith.

By consent of parties this cause is continued at the cost of def't, and execution is ordered therefor.

And afterwards, at a regular term of said court, begun and held on the 8th day of August, 1864, and continued on the 10th day of August, 1864, the following appears of record, to wit:

H. & St. Jo. R. R. Co.
vs.
Lewis Smith.

By consent of parties this cause is continued.

7 And afterwards, to wit, on the 14th day of February, 1865, at a regular term of said court, begun and held on the 13th day of February, 1865, and continued to said 14th day of February, the following appears of record:

H. & St. Jo. R. R. Co.
vs.
Lewis Smith.

Continued at pl'ff's costs.

And afterwards, to wit, on the 16th day of August, 1865, at a regular term of said court, begun and held on the 14th day of August, 1865, and continued on the said 16th, the following appears of record:

H. & St. Jo. R. R. Co.
vs.
Lewis Smith.

By consent this cause is continued at the plaintiff's cost.

And afterwards, to wit, on the 17th day of February, 1866, at a regular term of said court, begun and held on the 12th day of February, 1866, and continued on the said 17th, the following appears of record, to wit:

Hannibal & St. Joseph Railroad Company
vs.
8 Lewis Smith.

Now, at this day, come the parties herein, by their attornies, and this cause coming on to be heard by the court, neither party desiring the aid of a jury, and the court being advised of and concerning the

premises, and after hearing the evidence, proofs, and allegations of the parties, it is considered by the court that plaintiff take and recover nothing by its suit herein, and that said defendant go thereof without day, and that defendant recover his cost, by him in this behalf laid out and expended, and that he have jugdment for the same, and that he have hereof his writ of execution.

Whereupon plaintiff files its motion for a new trial, which, being taken up, and after argument by counsel is overruled by the court.

Whereupon plaintiff presents its bill of exceptions, which is
9 signed by the court and made a part of the record herein.

Which bill of exceptions is in the words and figures following, to wit:

In the Circuit Court of Macon county.—February Term, 1866.

Bill of exceptions.

H. & St. Joseph Railroad Company
vs.
Lewis Smith.

Be it remembered, that on this the 15th day of February, 1866, the above-entitled cause came on for trial; the plaintiff's petition, the defendant's answer, documentary and oral evidence. The pl'ff read in evidence an act entitled An act granting the right of way to the State of Missouri, and a portion of the public lands, to aid in the construction of certain railroads in said State, approved June 10th, 1852; and also an act entitled An act to accept a grant of land to the State of Missouri by the Congress of the United States, to aid in the construction of certain railroads in this State, and apply a portion there-
of to the Hannibal & St. Joseph railroad, approved Sept.
10 12th, 1852, both of which acts, by the agreement of the att'ys for the pl'ff and def't, may be read from the printed volumes containing the said acts, respectively, without the necessity of incorporating the same into the bill of exceptions, in the same manner and with like effect as if the same were herein set out at large. The plaintiff then read in evidence a copy of the following resolution of the board of directors, passed on the 7th day of March, 1853, and filed in the office of the Secretary of State on the 17th day, to wit: At a meeting of the board of directors of the Hannibal & St. Joseph Railroad Company, held in the city of Glasgow, on the 7th day of March, 1863, the following resolution was passed by said board:

Resolved by the board of directors of the Hannibal & St. Joseph Railroad Company, That the act of the general assembly of the State of Missouri, entitled "An act to accept a grant of land, made to the State of Missouri by the Congress of the United States, to aid in the
construction of certain railroads in the State, and to apply a
11 portion thereof to the Hannibal & St. Joseph railroad," approved the 20th day of September, 1852, together with all

grants therein contained, be, and the same is hereby, accepted by said company, in accordance with the provisions of said act.

Resolved further, That in testimony of the foregoing resolution, that it be signed by the president of the board and a majority of said directors, and countersigned by the secretary, and that the corporate seal of the company be thereto affixed.

Done and executed at the meeting of the board of directors aforesaid, at the city of Glasgow, in the State of Missouri, with the corporate seal of said company hereto attached.

[SEAL.] R. M. STEWART, *President.*
F. S. TALBOTT,
ROB'T T. BOYD,
THOMAS E. THOMPSON,
R. F. LAKENAN,
JOHN GENTRY, *Directors.*
WASHINGTON JONES, *Secretary.*

Filed March 17th, 1853.

JOHN M. RICHARDSON,
Sec'ry of State.

12 I, B. F. Massey, Secretary of State, do hereby certify that the above and foregoing writing is a true and correct copy of the original acceptance by the Hannibal & St. Joseph Railroad Company of a grant of land made by the State, through an act of the general assembly of the State of Missouri, entitled "An act to accept a grant of land made to the State of Missouri, by the Congress of the United States, to aid in the construction of certain railroads in this State, and to apply a portion thereof to the Hannibal & St. Joseph railroad," approved the 20th day of September, 1852.

In testimony whereof, I have hereto set my hand and affixed the seal of office. Done at the office of Secretary of State, in the city of Jefferson, this 5th day of October, A. D. 1860.

[SEAL.] B. F. MASSEY,
Sec'ry of State.

13 The plaintiff next read in evidence an exemplification of the map of the definite location and route of the Hannibal & St. Joseph railroad, from the city of Hannibal to the city of St. Joseph, Missouri, with a line on the same, denoting the line of said railroad, with lines and figures on the same, denoting the sections, townships, and ranges, on which exemplified copy of said map are the following certificate words and figures:

By agreement of att'ys for pl'ff and def't, the clerk is not required to copy any more of the exemplified copy of said map than is hereinbefore described; and the pl'ff shall have the privilege of using said exemplified copy in evidence, on the trial of this cause, before the Supreme Court.

J. M. Willis, sworn on the part of the pl'ff, testified: That the Hannibal & St. Joseph railroad was completed in the latter part of February, 1857, and that the land in controversy lies between
14 3 and 4 miles from said railroad.

The plaintiff next read in evidence the following list of lands certified to the Hannibal & St. Joseph Railroad Company by the commissioner of the general land office, as follows:

GENERAL LAND OFFICE.
November 18, 1854.

A list of vacant lands situated in the Palmyra, Milan, and Plattsburg districts, State of Missouri, in the sections bearing even numbers, within six miles of the route of the Hannibal & St. Joseph railroad, accruing to said State in virtue of the grant made by the act of Congress, approved the 10th day of June, 1852, as more particularly set forth in the general certificate hereto appended, to wit: The northwest qr. of the northwest qr., and the east half of the northwest qr.; the northwest qr. of the southwest qr., all in section 20, township 58, range 16.

15 GENERAL LAND OFFICE,
November 18*th*, 1854.

I certify that the foregoing ("amongst other") is a list of lands situated in the districts of land subject to sale at Palmyra, Milan, and Plattsburg, in the State of Missouri, remaining unsold and undisposed of in the alternate sections designated by even numbers, for six sections in width on each side of the railroad from the town of Hannibal to the town of St. Joseph, the survey and location of which said railroad has been filed in this office, in pursuance of an "act granting the right of way to the State of Missouri, and a portion of the public lands to aid in the construction of certain railroads in said State," approved June 10th, 1852; and I further certify that the said sections and parts of sections are granted to the said State of Missouri pursuant to the authority in said act, and I respectfully recommend that the said lands be approved to the said State
16 of Missouri, subject, however, to any valid interfering rights.
JOHN WILSON, *Commissioner.*

DEPARTMENT OF THE INTERIOR,
November 18*th* 1854.

Approved, subject to any valid interfering right.
R. McCLELLAND, *Secretary.*

Appended to the entire list of lands certified, as aforesaid, is the following additional certificate in the books containing said lists of lands:

GENERAL LAND OFFICE.
May 19*th*, 1856.

I, Thomas A. Hendricks, Commissioner of the General Land Office, do hereby certify that the foregoing, on pages one to sixty-five inclu

sive, is a true and correct list of the tracts of land within the six mile limits, granted to the State of Missouri by the act of Congress entitled "An act granting the right of way to the State of
17 Missouri, and a portion of the public lands to aid in the construction of certain railroads in said State," approved June 10th, 1852, being the vacant and unappropriated lands in the alternate sections designated by even numbers, for six sections in width on each side of the railroad from the town of Hannibal to the town of St. Joseph, in said State, which were submitted by the general land office for the approval of the Secretary of the Interior, and by him approved, as by the certificate thereto fully appears; and they are now certified to said State in this manner, in conformity with the provisions of the act entitled "An act to vest in the several States and Territories the title, in fee simple, of the lands which have been or may be certified to them," approved August 3d, 1854.

In testimony whereof, I have hereunto signed my name and caused the seal of the general land office to be affixed, at the city of Washington, the day and year first hereinabove written.

[SEAL.] (Signed) THOMAS A. HENDRICKS.
Commissioner.

18 GENERAL LAND OFFICE,
November 22d, 1859.

I, Samuel A. Smith, Commissioner of the General Land Office, do hereby certify that the annexed list and certificate is a true exemplification of the original on file in this office.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office, at the city of Washington, on the day and year above written.

[SEAL.] S. A. SMITH,
Commissioner of the General Land Office.

By agreement of the att'ys for pl'ff and def't, the clerk is not required to copy any more of said list of lands than that part embracing the lands in controversy.

The plaintiff here rested.

The defendant then read in evidence the act of Congress entitled An act to enable the State of Arkansas, &c., approved Sept. 28th, 1850. The def't next read in evidence the 1 Mo., 3rd and
19 4th sections of the act of the Missouri legislature, entitled "An act donating certain swamp and overflowed lands to the counties in which they lie, approved December 13th, 1853; 102, sections passed in 1857, both of which acts, by the agreement of the att'ys for the pl'ff and def't, may be read from the printed volumes containing said acts, respectively, without the necessity of incorporating the same into this bill of exceptions, in the same manner and with like effect as if the same were herein set out at large.

The defendant next read in evidence the following certificate of purchase from the sheriff of Macon county, to wit:

This is to certify that Isaac Millsaps has this day made sufficient

proof before Geo. Taylor, clerk of the Macon County Court, that he had an inprovement on the following lands: N. W. qr. of N. W. qr., and E. ½ of N. W. qr., and N. E. S. W. sect. 20, T. 58, range 16, the first day of September, 1855, which lands are donated to Macon
20 county, Mo., for school purposes, as swamp and overflowed lands. This, therefore, shall entitle him to a patent for the same, upon the payment of his note, which he has this day executed, with H. T. Jones and R. L. Shackelford as his securities, payable on the first day of February, 1856.

Oct. 3d, 1855.

C. C. McKINNEY, *Sheriff.*

For value received, I hereby sell and assign to Lewis Smith all the lands herein, with this certificate, the said Smith paying the purchase-money for the same, due to Macon county, with the interest thereon.

Given under my hand and seal this 13th day of April, 1857.

[SEAL.] ISAAC his × mark. MILSAPS.

Attest: A. D. GELSTRAP.

The defendant next read in evidence the following order of the County Court of said county, appointing Joseph D. Butler commissioner to select the swamp and overflowed lands in said
21 county, bearing date May 4th, 1852, to wit:

Ordered by the court, that Joseph D. Butler be appointed commissioner for swamp lands for Macon county, and that he be notified of this order, and proceed to select said lands according to the act or acts of the legislature donating the land as soon as practicable.

The def't next read in evidence the following report of said Butler to the County Court of Macon county of the swamp and overflowed lands, therein filed on the 7th day of February, 1853, to wit:

To the honorable the County Court of Macon county:

The undersigned commissioner would respectfully submit this as his report of lands selected as swamp lands within Macon county, among others, the following lands, to wit; the N. W. N. W., and E ½ N. W., and N. E. S. W. qr, all in section 20, T. 58, range 16. Opposite said land in said report is the following memoranda:

"All the lands situated in townships 58 and 59 have been
22 selected by running a line on the east side, and a line on the west side of the Chariton river, on which stream they are situated, including all lands along said stream that are subject to overflow and inundation during the seeding, growing, and harvesting seasons, and has frequent standing lakes and ponds, and the Chariton meanders through, and is unfit for cultivation without embankment or artificial draining.

"All of which is respectfully submitted.

"J. D. BUTLER, *Com.*

"Filed Feb. 7th, 1863.

"Ordered by the court, that the report of commissioner of swamp lands is received."

By agreement of the att'y for pl'ff and def't the clerk is not required to copy any more of the list of lands therein than that part of said report which embraces a description of the lands in controversy.

23 The defendant next read in evidence the following order of sale, made by said County Court, to wit:

Ordered by the court, that the sheriff of Macon county offer for sale to the highest bidder all the swamp and overflowed lands belonging to Macon county, on the 1st Monday in November next, 1855, and from day to day, except those lands which actual setlers or cultivation existed the 1st day of September, 1855; and the sheriff shall not sell any land for less than 1 25 per acre, one-tenth paid down for all land sold, and the purchaser to secure the balance by note and sufficient security, to the satisfaction of the sheriff, with ten per cent. from date, and due the 1st day of February, 1856; and any person residing on said lands on the 1st day of September, 1855, shall have the right to claim 160 acres; and any person having any improvements on said lands on said day, shall have the right to claim 80 acres, at 1 25 per acre, provided he or they prove up their
24 claim to the satisfaction of the clerk previous to the day of sale. Any person who shall produce to the sheriff a certificate of the clerk, describing the lands claimed, shall have the right to purchase the said lands without sale, at 1 25 per acre, by giving note and security, with 10 per cent. from date, and due the 1st of February, 1856, and the sheriff shall give certificate for all lands sold, which order bears date Sept. 5th, 1855.

John Souther sworn, and testified on the part of the defendant, as follows: He was acquainted with the land in controversy; knew it in 1850; it was in the Chariton bottom, on Painter creek. He settled there 26 years ago.

Question by def't's att'y. What was the character of the land in 1850, and, prior to that time? was it susceptible of cultivation? was it swamp and swampy, and subject to overflow?

25 The plaintiff's att'y objected to the witness answering this question for the following reasons, to wit:

Because the defendant is not entitled to prove, by the testimony of witnesses, the character of the land, whether it was susceptible of cultivation in 1850 and prior to that time or not, or whether it was swamp and swampy, and subject to overflow.

2d. Because the def't can only invalidate the title shown by the pl'ff's evidence by written or documentary evidence, showing a grant prior, in point of time, to the grant under which pl'ff claims title, and a full compliance with the terms of such grant or a patent issued prior in date to the vesting of the title in the plaintiff.

3d. Because the defendant can only invalidate the pl'ff's title on two grounds, viz: Want of authority in the officers of the United

States government certifying said land to pl'ff; 2d, fraud, on the part of pl'ff, in obtaining said title; and the def't did not offer to invalidate it on either of these said grounds.

26 4th. Because the def't can only show a paramount title to said land by showing that it has been selected as swamp and overflowed land by the State or the county under the State, reported to the Commissioner of the General Land Office, approved by him, and a patent issued therefor to the State, prior to the vesting of the title to the same in the plaintiff.

5th. Because the testimony offered is irrelevant, illegal, and that said defendant cannot show title to said land in this way, which objections the court overruled and allowed the witness to answer said question.

To which ruling of the court plaintiff at the time excepted.

The def't att'y then proceeded to interrogate the witness still further as to whether the land in controversy was swamp and overflowed. The plaintiff objected to any testimony being offered on the part of the def't as to the character of said land, whether it

27 was swamp and overflowed lands or not, in 1850 or prior and subsequent thereto, for the same reasons already stated for objecting to the questions propounded to the witness by the att'y for defendant, which objection was overruled and the witness for the def't allowed to testify in regard to the character of said land, whether it was swamp and overflowed or not, to which ruling of the court the pl'ff at the time excepted. The witness then testified, as follows:

I am acquainted with the land in controversy; knew it in 1850, and years before. I settled there 26 years ago.

Question by def't:

What was the character of that land in 1850, and prior thereto? Was it susceptible of cultivation, or was it swamp and swampy, and subject to overflow?

(Objected to by pl'ff, because illegal and irrelevant.)

Answer. It was overflowed land. I have seen the water over it, over section 20; when the creek gets up it spreads over the land.

28 I have seen it overflowed often; the Chariton backs up over it.

2nd. Was it wet and unfit for cultivation?

(Objected to by plaintiff.)

Answer. It was formerly wetter than now; more rain before 1850 than now; lands fit for cultivation now were too wet then; most of the section 20 was unfit for cultivation.

Cross-examined:

I have a suit of the same character with the Hannibal & St. Joseph Railroad Company; cannot describe the land in controversy by its numbers; don't know the amount of land in controversey; it was surveyed one year ago last July, and also eight or nine years ago; it was surveyed again by Butler and Walker; they selected the swamp lands; Chariton gets over the biggest part of this land when very high; it

was overflowed last summer by the Chariton. I have known the Chariton higher than it was last summer. Panther creek runs through this land, which heads in the bluffs about 4 miles above; lies north of the creek; the fence around it has been built 8 or 10
29 years; this field has been in corn ever since, and produces some good crops; tobacco has been raised on it; 15 or 20 acres in cultivation. The corn in places washed down, and the fences washed away in places. A heavy rain will raise the creek, which stays up 3 or 4 hours; sometimes stays up a day; both streams overflow this land. It was thought to be unfit for cultivation 16 or 20 years ago. Heavy rains were more frequent in early times than at present; heavy tramping has had a tendency to dry it. It took the land longer to dry prior to 1850 than it does now; rank grass kept it from drying; but a diagram of the land in controversy made out by Laughland, who surveyed it, was exhibited to the witness by the attorney for pl'ff, that it was a correct map, according to the best of his knowledge, as follows:

"Aug. 8th, 1864, and February 8th, 1866, made survey according to government field notes of N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of sec. 20, E. $\frac{1}{2}$; N. W. $\frac{1}{4}$ sec. 20, and N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of sec. 20; all in T. 58, N.
30 R., 16 W. of the 5th principal meridian, as shown on the place below.

F. R. LOCKING.

[Here follows map, marked page 30.]

31 A. L. Gelstrap sworn and testified for def't: I suppose I am acquainted with Smith's land. I have known it since 1838. I regard it as swamp land and overflowed. I run the north line in 1854. Painter creek is 4 miles long; this land in 1850 was covered with water; the whole was swampy, except a small portion. This land prior to 1850, a majority of the years that I knew it, was swamp land, and unfit for cultivation. No artificial draining on this land in 1851; where Smith's house now stands I saw covered with water on some places on the land as deep as my head; this field has been in cultivation a part of the time since 1854. One year I saw a crop; and one year there was some quantity, 8 or 10 acres more or less, a good crop of corn on it; and I suppose I have seen the Chariton river as high as the bridges across the Chariton on the State road, leading from Linneus to Bloomington.

Cross-examination:

32 I crossed the land very often for three years while in the land office at Milan; made frequent visits to where my residence was, and often crossed this land on such occasions. In practicing law since 1839, and canvassing county, often traversed it. The land along the bank of Painter creek was higher than portions further off from it. It got lower as it receded from the creek. It was higher than other parts of the low bottom, but not so high as the second bottom. Been practising law for many years in this county. Live 8 or 9 miles

from the land; have seen the land overflowed frequently; land did not dry as soon in 1850, and before as since; more rain fell formerly than of late years; the ground was then more swampy; the vegetation was very rank and prevented its drying off.

Mr. Winsell, being sworn, testified on the part of the defendant as follows: I live near this land; ¼ of a mile from it; have for 4 or
33 five years; known the land since 1844 to 1851. It was swamp and overflowed land, and not fit for cultivation; have rode over it; was mostly impassible, only in the fall; it was level ground, and water could not pass off. It was overflowed from both the creek and river. It took 3 or 4 months to dry off. The reason why it is drier now than years ago is, because vegetation was eaten off and the ground tramped down.

Cross-examined:

There is a field in cultivation on the land in controversy, and has been 8 or 9 years. This field has been in cultivation every year since 1854, except two years, during dry seasons; the crops on this land are good.

William Harrison, sworn, and testified on the part of the defendant; I know the land defendant lives on; known it for 18 or 19 years; came there about 1845; wet flat land up to 1850, and unfit for cultivation, because wet and flat, and held water the whole year.

Cross-examined:

This land overflows from the Chariton; the whole of it has
34 been overflowed in 1851, by the creek and Chariton; live ¾ of a mile from it; after it was overflowed, I have no idea it could be cultivated in a year.

Wm. Sears sworn, and testified on part of def't: Lived near Smith's land 30 years; knew the land prior to 1850; 21 years ago there was a a remarkable rise; the bottom was overflowed from bluff to bluff; vegetation in the bottoms was killed; 7 years after another deluge of water from bluff to bluff; in dry years can raise a crop on Smith's land; seasons were wetter prior to 1850 than they have been since, for several successive seasons. I have known this land too wet for cultivation; have known the land to overflow several successive years, sometimes twice a year.

Cross-examined:

I know the land defendant lives on; there are some few acres in cultivation on each side of the creek. A part of this land is
35 good tillable land; a portion wet and swampy. I made a high water mark some 7 years ago. Showed this mark to Mr. Willis, and showed another mark to Rice, but this was not the right one. I canoed at the time I made the mark I showed Willis. I went over the land in question in a canoe.

Laughlin sworn, and testified on part of pl'ff: I reside in Hannibal; occupation, surveying and civil engineering. I am city engineer for Hannibal; been surveying and engineering for 18 years; known

the land in controversy, surveyed it in 1864, and again quite recently; drew a diagram of the land, (the same that is referred to in John Souther's testimony.) Mr. Willis was with me; the N. W. of N. W. of the land in controversy was the highest part; the land is higher on the north and west than on the south and east; there is a fall of 12 feet on this land from Smith's house to the northeast corner of his land; the ground from east to west descends sufficiently to pass the water off. When first there some of this land was in cultiva-
36 tion; corn was good; this was in August, 1864. I have surveyed swamp land in Arkansas. I do not consider this swamp land; if any, so small that I would not consider it swamp land. I surveyed swamp land on Cash river and White river, in the State of Arkansas, as deputy surveyor, and the lands selected there as swamp lands, were of a different character from the land in controversy; they were marshy, and the water stood on them the year around, and was necessary, in order to cultivate them, to resort to levees and drainage.

Cross-examined:

I don't know the character of the land prior to 1850; the land is susceptible of cultivation without leveeing or draining.

A. Rice sworn, and testified on the part of pl'ff: Reside in Hannibal; by profession a civil engineer, have been since 1850. I was shown the land in controversy by Mr. Laughlin; was on it one week ago; was shown high water mark of Mr. Sears, a witness who testi-
fied for defendant. The level showed that the N. E. corner of
37 the land in controversy was one foot above high water mark, and the S. E. corner N. E. qr. N. W. qr. 6 feet above high water mark. The house stands 12 feet above high water mark; N. E. corner of the N. E. of S. W. overflows 8 or 10 inches; there is a gradual slope from the house to the N. E. corner. N. W. N. W. nearly as high as the house; the two south forties will overflow 5 or six acres; south 40 ~~acre tract~~ will not overflow. I applied my level. I would not call it swamp land, but second bottom; it drains naturally, allowing 1½ feet for difference in the fall of the river opposite the land, and when I was shown the high water mark by Mr. Sears, will make the N. E. corner of the land overflow from 6 to 10 inches.

Wan Roberts sworn, and testified as follows in behalf of the pl'ff: I live three miles west of Chariton bridge; know the land in controversy; moved to this county in 1858. The land is high bottom land; overflows occasionally; I cannot call it swamp land, but a portion
is wet land; of the four forties one fourth is not susceptible of
38 cultivation; the greatest portion of each 40 acre tract is susceptible of cultivation without leveeing or drainage.

Cross-examined:

I do not know its condition prior to 1850.

Harrey Green sworn, and testified as follows in behalf of the plaintiff: I live on the south side of section 19. I know the land in contro-

versy; was on it in 1853; small part of it in cultivation. I own similar land, which is adjacent to the land in controversy, which produced good corn this year; my land is as low as Smith's land, and his land is susceptible of cultivation in ordinary years. I did not know the land before 1853; it was at that time wetter than now; it is susceptible of cultivation without leveeing or draining.

Cross-examined:

I know nothing of this land prior to 1850; the land is not as swampy now as formerly.

39 This was all the evidence.

The plaintiff then asked the court, sitting as a jury, to make the following declarations of law:

1st. Under the act of Congress, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits, approved Sept. 28th, 1850," to title to the land in controversy could not be divested out of the United States until an accurate list and plat of said land had been made out by the Secretary of the Interior and the same transmitted to the Governor of the State; and at the request of said Governor, said secretary had caused a patent to be issued to the State therefor, in pursuance of the 2d section of the act aforesaid.

Refused.

2nd. If the court believe from the evidence that said land is a part of the land granted to the State of Missouri by the act of Congress, entitled "An act granting the right of way to the State of Missouri, and a portion of the public lands to aid in the construction of

40 certain railroads in said State, approved June 10, 1852, and by the act of the legislature of the State of Missouri, to the Hannibal & St. Joseph Railroad Company, by the act entitled "An act to accept a grant of land made to the State of Missouri by the Congress of the United States, to aid in the construction of certain railroads in this State, and apply a portion thereof to the Hannibal & St. Joseph Railroad," approved Sept. 20th, 1852, and that plaintiff accepted said act and all grants therein contained by a resolution of its board of directors on the 7th day of March, 1853; and that a copy of said resolution was filed in the office of the secretary of State, as prescribed by the 4th section of the last-mentioned act; and that a copy of the location of the plaintiff's railroad was made and certified by plaintiff's president and chief engineer, under the corporate seal of the plaintiff, and forwarded and filed in the office

41 of the commissioner of the general land office on the 10th day of June, 1853, as prescribed by the 1st section of the act of Congress and 2nd section of the act of the Missouri legislature aforesaid; and that said land is within six miles of the pl'ff's railroad as located, and that said railroad was completed in 1859: and if the court further believe from the evidence that said several acts mentioned in this instruction had been done prior to the issuing of a

patent to the State of Missouri for said lands, as laid down in the 1st instructions, then the title to said land is vested in the plaintiff and the court will find for plaintiff.

Refused.

3rd. Under the act of Congress, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," approved Sept. 28th, 1850, the title to said land could not be divested out of the United States until evidence had
42 been filed with the commissioner of the general land office showing it to be swamp and overflowed lands within the purview of said act, and a patent issued therefor, or after the filing of said evidence, until the passage of the act of Congress of the 3d of March, 1857, confirming the title thereto in the State, without any patent; and if the court believe from the evidence that the plaintiff had complied with and performed the several acts on its part specified in the act of Congress, entitled "An act granting the right of way to the State of Missouri, and a portion of the public land, to aid in the construction of certain railroads in said State," approved June 10th, 1852, and of the act of the legislature of the State of Missouri, entitled "An act to accept a grant of land made to the State of Missouri, by the Congress of the United States, to aid in the construction of certain railroads in this State, and apply a portion thereof
43 to the Hannibal & St. Joseph Railroad," approved Sept. 20th, 1852, and said land lies within six miles of the pl'ff's railroad as located, and said railroad was located prior to the institution of this suit, and prior to the issuing of said patent, or filing the evidence in the office of the commissioner of the general land office, as aforesaid, and prior to the passage of said act of Congress confirming the title to said land to the State, then the title thereto is vested in the plaintiff, and the court will so find.

Refused.

4. If the court believe from the evidence that said land is a part of the land granted to the State of Missouri by the act of Congress as aforesaid, approved June 10th, 1852, and by the act of the legislature of the State of Missouri, as aforesaid, approved Sept. 20th, 1852, and that said land lies within six miles of plaintiff's railroad as located, and said railroad was completed prior to the insti-
44 tution of this suit, then the court will find for plaintiff.

Given.

5. To constitute land overflowed within the purview of the law the same must be overflowed during the planting, cultivating, and growing seasons in each year, as to be made unfit thereby for cultivation without constructing levees and drains to reclaim the same.

Refused.

6. To constitute land swamp within the purview of the law the same must be so wet and marshy during the planting, cultivating, and growing season in each year, as to be made unfit thereby for cultivation without levees and drains to reclaim the same.

Refused.

7. To constitute land overflowed within the purview of the law

the same must be so overflowed during the planting, cultivating, and growing season during a majority of years, as to be made unfit thereby for cultivation without constructing levees and drains to reclaim the same.

Given.

45 8. To constitute land swamp within the purview of the law the same must be so wet and marshy during the planting, growing, and cultivating season in a majority of years, as to be made unfit thereby for cultivation without constructing levees and drains, to reclaim the same.

Given.

9. If the court believe from the evidence that said land is neither swamp nor overflowed, as defined in instructions numbered 5–6, it will find for plaintiff.

Refused.

10. If the court believe from the evidence that said lands is neither swamp nor overflowed, as defined in instructions numbered 7–8, it will find for the p'ff.

Given.

The court gave Nov. 4, 7, 8, and 10, and the balance of said declarations it refused to make, to which refusal to make said declarations of law the pl'ff at the time excepted.

The defendant then asked the court to make the following

46 declarations of law:

1. That if the lands sued for were on the 28th day of September, 1850, swamp or overflowed lands, and thereby rendered unfit for cultivation, then the act of Congress of that date was a present absolute grant thereof to the State of Missouri, and were by the acts of the legislature of 1851 conveyed to Macon county, and the plaintiff has no title thereto.

Given.

2. That the State of Missouri, having conveyed to Macon county the swamp lands therein, having conveyed subsequently to the Hannibal & St. Joseph Railroad Company lands granted by Congress to the State, for railroad purposes, that even through the act of Congress granting swamp lands to the State of Missouri, was a conditional grant, yet the absolute grant of said lands by the State to the counties is a qualification and limitation of the grant to

47 the railroad company, and the grant to the railroad company from Missouri was made subject to the previous grant by Missouri of the swamp lands.

Given.

3. That the act of Congress granting railroad lands was made subject to the act granting swamp lands to the State, and swamp lands were not included in the grant of lands for railroad purpose.

Given.

Which the court made; to the making of which the plaintiff at the time excepted.

The case was then submitted to the court sitting as a jury, who found that the lands sued for was swamp and overflowed land in 1850, and gave judgment as aforesaid.

The plaintiff then filed the following motion to set aside said finding of the court, and grant a new trial, to wit:

48 In the Circuit Court Macon county, Feb. term, 1866.

THE HANNIBAL & ST. JOSEPH Railroad Company *against* LEWIS SMITH.

Plaintiff moves the court to set aside its finding in the above-entitled cause, and grant a new trial for the following reasons:

1. Because the court found without evidence.
2. Because the court found against evidence.
3. Because the court admitted illegal testimony on the part of the defendant.
4. Because the court refused to admit legal testimony on the part of the plaintiff.
5. Because the court refused to make legal and proper declarations of law asked by the plaintiff.
6. Because the court made illegal and improper declarations of law asked by the defendant.

49 7. Because the court found and rendered judgment for the defendant, when it should have found and rendered judgment for the plaintiff.

JAMES CARR,
Att'y for Pl'ff.

Filed February 17, 1866.

W. T. GILMAN, *Clk.*

Which motion the court, after hearing and being advised of and concerning the same, overruled, to the overruling of which the plaintiff at the time excepted. Whereupon the plaintiff tendered this its bill of exceptions, and prayed the court to allow, sign, seal, and make the same a part of the record in this cause, which is done accordingly.

[SEAL.] G. H. BURCKHARTT.

And afterwards, to wit, on said 17th day of February, 1866, the following appears of record, to wit:

H. ST. JO. R. R. *vs.* LEWIS SMITH.

50 Plaintiff, by his att'y, files affidavit and bond, and prays for an appeal to the Supreme Court of the State of Missouri, which bond is approved by the court, and the appeal is granted, and it is ordered that the clerk of this court make a complete and full transcript of this cause, and transmit the same without delay to the clerk of the Supreme Court at St. Joseph, Missouri, without delay.

H. & St. Jo. R. R. Co.
vs.
Lewis Smith.

In the Circuit Court of Macon county, February term, 1866.

Copy of said affidavit.

The affiant states that the application for an appeal by the Hannibal and St. Joseph Railroad Company, plaintiff, is not made
51 for vexation or delay, but because this affiant believes that the appellant is aggrieved by the judgment of said court.

J. M. WILLIS.

Subscribed and sworn to before me this 17th day of February, 1866.

W. T. GILMAN, *C'lk.*

Copy af said bond.

We, the undersigned, the Hannibal & St. Joseph Railroad Company as principal, and J. M. Willis and James Carr, and Joseph Vincent, as securities, acknowledge ourselves indebted to Lewis Smith in the sum of two hundred dollars, to be void upon this condition:

Whereas Lewis Smith recovered a judgment against the Hannibal & St. Joseph Railroad Company, in the Circuit Court within and for the county of Macon, in the State of Missouri, during the February term, 1866, of said Circuit Court, for the sum of $, damages and costs, in an action wherein said Hannibal & St. Joseph
52 Railroad Company, pl'ff, and said Lewis Smith, defendant; and whereas said Hannibal & St. Joseph Railroad Company appealed from the judgment of the said Circuit Court to the Supreme Court of Missouri; now, if on such appeal, the appellant shall prosecute its appeal with due diligence to a decision in the Supreme Court, and shall perform such judgment as shall be given by the Supreme Court, or such as the Supreme Court may direct the Circuit Court to give, and if the judgment of said court, or any part thereof be affirmed, that it will comply with and perform the same as far as it may be affirmed, and will pay all damages and costs which may be awarded against the appellant by the Supreme Court; then this recognisance shall be void.

(Signed)
THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY,
By JAMES CARR, *Att'y*
JAMES CARR.
J. M. WILLIS.
J. VINCENT.

53 Approved and filed Feb. 17th, 1866.
W. T. GILMAN, *Clerk.*

STATE OF MISSOURI, *County of Macon*:

I, W. T. Gilman, clerk of the Circuit Court within and for said county, do hereby certify that the foregoing is a full and correct transcript of the record, proceedings, and papers in the cause wherein the Hannibal & St. Joseph Railroad Company is plaintiff, and Lewis Smith is defendant, as the same appears upon the record and files of my office.

In testimony whereof, I have hereunto set my name and affixed the seal of said court at office in Macon, on this March 24th, 1866.

[SEAL.] W. T. GILMAN, *Clerk*.

[Stamp 5 cents.]

54 And on the reverse of said record is the following endorsement, to wit:

H. & St. Jo. R. R. Co. *vs.* Lewis Smith. Transcript. Filed August 2nd, 1866. T. B. Bigger, cl'k. By W. H. Sherman, D. C.

And afterwards, to wit, at a regular term of the said Supreme Court of the State of Missouri, begun and held at the city of St. Joseph, on the 18th day of February, 1867, the following appears of record, to wit:

THE HANNIBAL & ST. JOSEPH R. R. Co.
vs.
LEWIS SMITH.

Now comes the plaintiff herein, by its attorneys, and files its assignment of errors; which said assignment of errors is in the following words and figures, to wit:

55 THE HANNIBAL & ST JOSEPH Railroad Company, appellant,
vs.
LEWIS SMITH, respondent.

In the Supreme Court Mo., Feb. term, 1867. St. Joseph.

Appeal from Macon Circuit Court.

And now comes the same appellant and says, that in the record and proceedings of the court below in the above-entitled cause there is manifest error, and for error said appellant assigns the following, to wit:

1. That said court admitted improper and illegal testimony offered by respondant.
2. That said court rejected proper and legal testimony offered by appellant.
3. That the court made improper and illegal declarations on the part of the respondant.
4. That the court refused to make proper and legal declarations offered by appellant.

5. That the finding was against the evidence.
56 6. That the finding was against law.
7. That the finding was against both law and evidence, and against the law under the evidence.
8. That the finding was against the weight of evidence.
9. That the judgment was rendered in favor of the respondent, when it should have been rendered for the appellant.

That said court overruled the motion for a new trial made by appellant.

CARR, HALL & CLIVER,
Attorneys for Appellants.

And now comes the respondent, and for joinder in error, says that there is no error in the record and proceeding of said Circuit Court of Macon county in said cause, as assigned by said appellant.

HALL & PREWITT,
For Resp.

And afterwards, to wit, at a regular term of said court, begun and held at the city of St. Joseph, on the 18th day of February,
57 1867, and continued on the 19th day of February, 1867, it being the second day of said term, the following, among other proceedings, was had, to wit:

HANNINAL & ST. JOSEPH RAILROAD COMPANY
vs.
LEWIS SMITH.

Now, at this time, come the parties herein, by their respective attorneys, and this cause, after being argued, it is submitted to the court.

And afterwards, to wit, at a regular term of said Supreme Court of the State of Missouri, begun and held at the city of St. Joseph, on the 19th day of August, 1867, the following, among other proceedings, was had, to wit:

Appeal from Macon Circuit Court.

HANNIBAL & ST. JOSEPH RAILROAD COMPANY,
appellant,
vs.
LEWIS SMITH, respondant.

Now, again came the parties aforesaid, by their respective attorneys, and the court, being now sufficiently advised of and concern-
58 ing the premises, doth consider and adjudge that the judgment of the Circuit Court of Macon county rendered herein be in all things affirmed and stand in full force and effect, and that the said respondent recover of the said appellant his costs and charges herein expended, and have execution therefor.

Opinion filed.

Which said opinion of said court was filed on the said 19th day of August, 1867, in open court, during the the said August term of said court, 1867, and is in the following words and figures, to wit:

59 In the Supreme Court, August T., 1867.

Opinion of the Court.

THE HANNIBAL & ST. JOSEPH RAILROAD COMpany, apl'ts,
vs.
LEWIS SMITH, res.

This was an action of ejectment to recover possession of certain land situate in the county of Macon, and claimed by the plaintiff. under the acts of Congress of the 10th of June, 1852, and the 3rd of August, 1854, (10 U. S. Stat., p. 8, p. 346,) granting to the State of Missouri a portion of the public lands in aid of the construction of certain railroads, and providing for a descriptive list of the lands granted to be certified to the State from the general land office, and under an act of the general assembly of the State accepting the grant and applying a portion thereof to the Hannibal & St. Joseph railroad, approved Sept. 20th, 1852, (Laws of Mo., 1853, p. 15.)

60 The defendant stood upon his possession as a purchaser from the county of Macon, under a grant from the State, and relied upon the act of Congress entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," approved Sept. 28th, 1850, (9 U. S. Stat., 519,) and upon the act of the general assembly of the State of Missouri donating "certain swamp and overflowed lands to the counties in which they lie," approved March 3d, 1851, and Dec. 13, 1855, (Laws of 1851, p. 238, Rev. Stat. of 1855, p. 1005.)

The only evidence offered by the plaintiff to identify the specific tract of land in controversy as a part of those which came within the operation of the act of Congress of 1852, as a grant of title for railroad purposes, was the descriptive list certified to the State by the commissioner of the general land office, containing these lands, together with the map of the definite location of the railroad

61 route. This list was made out and certified in conformity with the provisions of the act of Congress of the 3rd of August, 1854, and was approved by the Secretary of the Interior, subject to any valid intervening right. The act provided as follows:

"That in all cases where lands have been or shall hereafter be granted by any law of Congress, to any one of the several States and Territories, and where said law does not convey the fee simple title of such lands, or require patents to be issued therefor, the lists of such lands which have been or may hereafter be certified by the commissioner of the general land office, under the seal of said office,

either of originals or copies of originals or records, shall be regarded as conveying the fee simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress and intended to be granted by such act of Congress; but where
62 lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, or claim, or interest shall be conveyed thereby."

That the act of Congress of 1852 was one of the acts here referred to, there is little room for donbt. It did not directly convey the fee simple to any specific and certain tracts of land, nor did it require patents to be issued. The particular sections or parts of sections which were to be the subjects of the grant remained to be ascertained in future. The act itself made no provision for any kind of documentary evidence to be issued from the land office by which the location, boundaries, and identity of the particular tracts of land granted within the six mile limit were to be designated and proved.

The public sectional surveys showing the even numbered sections within the six mile limit, on either side of the located road, though admissible evidence, have been held to be insufficient for this
63 purpose, (Baker *vs.* Gee, 1 Walt. U. S. 333, Pacific R. R. *v.* McCombs 39, Mo. 329.) We suppose the proper effect of this provision of the act of 1854 to be, that such lists shall be regarded as evidence of this location and identity, sufficient to bring the tracts of land therein contained and described within the granting words of the act of 1852, and so to convey the title and fee simple; but if the lands embraced in such lists, are not of the character contemplated by such act of Congress, and are not such as were intended to be granted thereby, then the lists are to have no effect as evidence.

Now, what is meant by the character of lands contemplated and intended to be granted by such act?

The provision seems to refer to the given act of Congress itself for the explanation. This act of 1852 excepted from its operation all lands sold or subject to the right of pre-emption, or in any manner reserved; and "all land heretofore reserved to the United States by any act of Congress, or in any other manner by competent
64 authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatever," were thereby again expressly "reserved from the operation of this act," excepting only the right of way for such railroad. It was plainly not the intention of the act to grant any land for railroad purposes which had been reserved to the United States, or in any manner granted and appropriated by law to any other object of internal improvement.

Less than two years previously Congress had passed the act of 1850, (9 U. S. Stat., p. 519,) whereby it was enacted that "the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted" to the States for the purpose of

the reclamation of such land in those States. The expression, *the character of lands* contemplated and intended to be granted, when applied to this act of 1852, may be taken to mean lands not
65 subject to pre-emption, nor reserved, nor appropriated by law, to aid in any object of internal improvement; and it may safely be affirmed that the first section of the prior act of 1850 amounted, at least, to a reservation to the United States of the swamp and overflowed land therein mentioned. It was, in terms, a present grant, and was a solemn appropriation, by law, of all those lands to a specific object of internal improvement within the several States, and as such these lands were reserved and excepted from the operation of the act of 1852, granting vacant and unappropriated lands for railroad purposes. It would seem to be very plain that it was not the intention of Congress to grant to the State for railroads the same lands which had already been granted to her for another and different object. It must follow that if the lands in controversy were in fact of the character of swamp and overflowed land,
66 within the purview of the act of 1850, then the certified list offered in evidence here, so far as it embraced these lands which were not contemplated nor intended to be granted by the act of 1852 itself, must be held to be perfectly null and void.

The case seems to have been tried below, and has been argued here upon the assumed theory that this first section of the act of 1850 was a present and absolute grant, and vested title in the State at once, leaving nothing to be done in order to show a vested title to any given tract, but to prove by evidence, even by the testimony of witnesses, that the land in question was, at the date of the act, of the character and description of swamp and overflowed land within its purview. This view of the matter cannot be sustained.

The whole act must be taken together. This well settled rule of construction was applied to a similar act of Congress in the
67 case of Rue *v.* Railroad Co. (1 Black, (U. S.) 358.) If the first section were the whole act, there might be some room for the position assumed, however difficult it might be to ascertain by proof the particular lands which were to be the subject of the grant. This difficulty is provided for in the act itself. The second section makes it the duty of the Secretary of the Interior to ascertain the specific tracts of land in conformity with the sectional subdivisions of the public surveys, and to make out "an accurate list and plats" thereof, and transmit the same to the governor, and on his request "to cause a patent to be issued to the State therefor, and on that patent the fee simple to said lands shall vest in the State;" and by the third section he is to determine whether the greater part of any legal subdivision is of "that character," and if so, include it in the list; otherwise not. No other way of ascertaining the particular tracts for the purpose of passing the title
68 in fee was contemplated by the act; and it was obviously the intent of Congress, and is the proper legal effect of the act, that there was granted, and should be conveyed by patent, the lands which should be contained in that list, and none other are to be [con-]

conveyed, though it was also clearly intended that all lands of that character should be included in the list and plats. Until the particular subjects of the grant shall be thus ascertained, no title can vest; the lands granted are thereby rendered certain, and it may then be said that the legislative grant becomes complete to vest the title in fee even without a patent, the issuing of which may be considered as the act of a ministerial officer. It has been so held by the Supreme Court of Mississippi. (Fore *v.* Williams, 35 Miss., 533.) The act supposes that the governor will accept the grant of the lands so listed and platted before a patent issues. In Fore *vs.* Williams, a list made out by the register under the direction of the gov-
69 ernor, and approved by the Secretary of the Interior, was held to be a substantial compliance with this provision. The Supreme Court of Wisconsin refused a mandamus to compel the school commissioners to issue a certificate of purchase to a pre-emptor under the laws of the State, disposing of lands granted by this same act of Congress, for the reason that no patent had been issued, and no title vested in the State, and it was said to be "quite obvious that the fee simple to the land does not vest in the State until a patent issues." (Parsons *v.* Commissioners, 9 Wis., 236.) We think, with the decision in Fore *v.* Williams, that it may vest when the list and plats are made out and approved by the Secretary of the Interior and accepted by the governor.

In some other cases, where the question arose incidentally under State statutes disposing of these lands, the language of the courts might seem to give some countenance to a different opinion. (Alli-
son *v.* Halfacre, 11 Iowa, 450; Whiteside Co. *v.* Atty, 31
70 Ills., 68; Fletcher *v.* Pool, 20 Ark., 100.) But on close examination, it is evident that the possibility of the grant operating to vest a title in fee to any particular tract before its definite location and boundaries were thus ascertained was not contemplated. The case of Hempstead *v.* Underhill (20 Ark., 337) is more nearly in accordance with the decision in Rutherford *v.* Greene, (2 Wheat, 197,) which was the case of a grant of 25,000 acres of lands within the lands to be allotted to the officers and soldiers of the army, and the words "shall be allotted and are given" were held to be a grant by force of the act, not needing any further granting act; and that when surveyed it became a gift of the particular lands contained in the survey; that the survey gave precision to the title "and attached it to the land surveyed," and that the subsequent grant by another act related back to the inception of the title. This case was further explained in Lissiere *v.* Price. (12 How. (U. S.) 76.) We have no doubt that it presents the correct view of the law, and we take it to be clearly to the effect that until the particular lands on
71 which the act is to operate as a grant of title shall be ascertained and designated in the manner pointed out by the act itself, the grant cannot attach to any specific tracts. Until then, there is no title which can give the party a standing in court, either at law or in equity. Whatever equity there may be must be considered as addressed to the political power, though there be such an

inchoate equitable right as may be the subject of alienation, and constitute a basis for the operation of the doctrine of relation whenever the title in fee shall pass out of the United States. The power to determine on what specific tracts of land shall operate as a grant of title is given to the Secretary of the Inierior. This is a political function and is beyond the control of the courts, (West *v.* Cochrane, 17 How, U. S. 403; Magwire *v.* Tyler, 1 Black 195; Stanford *v.* Taylor, 18 How U. S. 409; Menard *v.* Massey, 8 How, U. S. 293; Lafayette *v.* Kenton, 18 How U. S. 59.)

It appears that the States have dealt with these lands much in the same way as if the act had been an absolute grant, vesting a
72 present title in fee, and the courts have recognised the right of the State to dispose of them, under its own laws, before a list was made out or a patent issued. (Mast *v.* Hamilton, 14 La. Ann., 775; Dunklin Co. *v.* District Court, 23 Mo., 449, and cases above cited.) Whatever legal ideas may have been intended in the expressions which had been used in these cases in relation to the grant and title, there would seem to be no room for question that the act amounted at least to an appropriation by law of all such lands within the several States to the specific purpose of fulfilling this grant, and made an effectual reservation of them, to be applied, under the act, to that purpose and to no other, and to be listed and platted and patented to the State for this specific object of internal improvement. More express words of reservation than those employed in the act of 1852 were not needed for the purpose of making
73 the reservation embrace these lands, which had been thus specifically appropriated by the act of 1850 to fill this grant to the States. The language of Baldwin, J., in Wilcox *v.* Jackson, (13 Pet., 498,) may find a proper application here. "Whensoever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of the public lands, and no subsequent law, or proclamation or sale, would be construed to embrace it, or to operate upon it, although no reservation were made of it." A sale of land so appropriated or reserved, and even a patent, without further legislation to authorize it, has been held to be void.—(State *v.* Haur, 19 Mo., 602; Brown *v.* Clements, 3 How., U. S., 667.)

Though the lands had been thus appropriated and granted, the political power over them was not wholly relinquished, but was to be exercised by the public officer to whom it was committed by
74 the act itself in good faith, and in such manner as to accomplish the object of the grant and the intent of Congress. (Foley *v.* Harrison, 15th How. U. S., 433.) Whenever the title in fee shall become vested in the State, it cannot be doubted that it will relate back to the date of the grant, and will vest, by relation in the grantees, under the State and counties; and such title would be prior and superior to any title that could be acquired under the act of 1852 and 1854. (French *v.* Spencer, 10 How. U. S. 248; Ross *v.* Barland, 1 Pet., 664; Rutherford *vs.* Greene, 2 Wheat., 197; Gibson *vs.* Chouteau, 39 Mo., 558.)

These particular sections and parts of sections have been embraced in the lists made out, under the acts of 1852 and 1854, as a part of the grant for railroads; and if Congress had submitted the final determination of this matter to the decision of the Secretary or Commissioner, there could be no doubt that the title shown by the
75 plaintiff here should prevail in the action of ejectment, no vested legal title being shown by the defendant; for, though the lands were reserved, Congress still had the power to dispose of them. But such is not the case. So far as this list embraced lands which were not of the character contemplated by the act of 1852, nor intended to be granted thereby, it is by the very terms of the act of 1854 itself null and void, and can be no evidence of title.

The question remains, by what kind of evidence is it to be judicially determined, whether the lands in controversy came within the purview of the act of 1850, or were not of the character of lands intended to be granted by the act of 1852? No doubt if the Secretary of the Interior had included these lands in his list, and plats of swamp and overflowed lands, his action would have been final and conclusive of that matter in the courts, but his including them
76 in his list of railroad lands is not conclusive. It was left open by Congress to be determined on judicial investigation. The power to determine it finally was not given to any public officer.

The political power over the subject was not retained by the government, but it was made a question of evidence and judicial construction, and we think it was intended to be and was referred to the courts.

The act of 1852 does not appear to have required any selection or listing of the lands embraced within the even numbered sections within the six-mile limit, but only of those which should be selected in lieu of them outside of that limit, and within fifteen miles of the line of the railroad; but the statutes of the State did require a selection of both kinds to be made by the agents of the State, and a map of the lands selected to be recorded in each county where the lands were situated, and the practice of the land office seems to have been to include both in the lists. No means of proving a title to
77 the specific lands granted was provided by the act itself.

The act of 1854 seems to have been intended to supply this defect. In Baker *v.* Gee (1 Walt., 333) these descriptive lists were recognized as being the proper evidence "to show the lands to which the road was entitled." The validity of the State statutes imposing burdens and conferring privileges upon the grantees of the State was admitted, and it was held that this corporation could not recover against a defendant claiming by pre-emption under the State, without showing that a map of the lands selected and located for the railroad had been duly recorded, as required by the statute, (Pacific R. *v.* McCombs, 39, Mo. 320; Hannibal & St. Joseph R. Co. *vs.* Moore, 37, Mo. 338. No such map was offered in this case, and the question was not raised on the trial below. The plaintiff relied exclusively upon the list of the commissioner, approved by the secretary. Neither
78 of these officers had any more power over the subject than

was given to him by the act of Congress itself; and it is plain that these lists were not intended to be final and conclusive. It is equally plain that Congress did not intend by this act of 1854 to make any new grant of land which had not already been granted by the act of 1852; and it must have been the intention of Congress that the question of the character of lands contemplated and intended to be granted by that act should be determined upon judicial inquiry whenever this list should be offered in evidence in court. Therefore the list must admit of a rebuttal and disproof.

Why may not this be done by any competent and admissible evidence? We are not aware of any law that would require it to be done by documentary evidence only. It might be done by documentary evidence, showing a prior or better title in the defend-
79 ant, but he is not put to such a defence. The inquiry is, whether these were of the character of swamp and overflowed lands, unfit for cultivation at the date of the act of 1850, either in the whole or in the greater part of any given sectional subdivisions; and the testimony of witnesses is offered for the purpose of showing, that as such they fell within the purview of that act, and were taken out of the operation of the act of 1852. This is wholly a matter of fact in pais. Such evidence is admissible to bring a given tract of land within the operation of a legislative grant, and it may be admitted to take it out where no positive statute nor any rule of evidence intervenes. The determination of this matter of fact may as well be left to a jury in the one case as in the other. If such were in fact the character of these lands, then the commissioner had no authority by law to include them in this list, and though included, the
80 list can have no effect as to them.

The reason why the same kind of evidence should not be admitted, to show a title vested and complete under the first section of the act of 1850, is that the other section provided a different mode of establishing title under that act, and required another kind of evidence, which is thereby made the best, and the only admissible for that purpose. The case has been argued, apparently upon the theory that this testimony was offered for the purpose of proving a title vested in the defendant. For that purpose it was certainly not admissible; but for the purpose of rebutting and invalidating this list, produced in evidence by the plaintiff, we think it was admissible and competent.

Under the instructions which were given the cause was submitted to the jury, and the verdict must have been rendered substan-
81 tially upon this issue of fact. If this fact were found for the defendant, then the plaintiff had shown no title to the lands in controversy. He must recover on his own title or not at all; and it was immaterial whether the defendant had shown any title or not. He had a right to stand on his possession until a better title were proved.

The first instruction refused for the plaintiff contained a correct proposition of law, and might have been given if there had been any evidence before the jury on which the issue supposed in it could

properly arise. It concerned the defendant's title only, and that was immaterial. There was, therefore, no error in refusing it of which the plaintiff can complain.

The other instructions refused for the plaintiff, are sufficiently disposed of by what has been said above. They were either erroneous or immaterial.

82 As to the difference between the expression "in the majority of years," and "in each year," in reference to the fitness of the land for cultivation, we are inclined to think that the former was the more nearly correct.

The instructions which were given for the defendant, though somewhat vague, and apparently based upon legal ideas, which are not very clear to us, were nevertheless substantially correct, or at least not so clearly erroneous in any respect that the plaintiff could have been seriously prejudiced.

The first one made the plaintiff's right to recover depend upon the question of fact, whether these lands were of the character of swamp and overflowed lands, unfit for cultivation; and taken together, with those given for the plaintiff on the same subject, placed

83 the issue fairly enough before the jury, whether the phrase "a present absolute grant thereof," meant a fee simple or an appropriation by law. In either case the plaintiff's right to recover depended on the issue of fact, which the instructions submitted to the jury.

The second and third instructions would seem to have been correct enough, so far as any principles of law were involved in them, and we do not see that they were materially erroneous. Their bearing upon the issue was very remote. We cannot say that the plaintiff has suffered any prejudice by their having been given.

The jury were to judge of the weight of the evidence, and the issue being found for the defendant, the verdict will not be disturbed.

Judgment affirmed.

The other judges concur.

N. HOLMES.

84 On the reverse of said opinion appears the following endorsement, to wit: The Hannibal & St. Joseph Railroad Co., appl't, *v.* Lewis Smith, res. Opinion. Affirmed. Holmes. Filed August 19th, 1867. Wm. M. Albin, cl'k, pr. L. R. Lancaster, D. C.

And afterwards, to wit, on the 25th day of September, 1867, there was filed by said appellant in the office of the clerk of said Supreme Court of the State of Missouri a bond for a writ of error from the Supreme Court of the United States to said Supreme Court of the State of Missonri in said cause, which said bond is in the words and figures following, to wit:

Know all men by these presents, that we, James Carr, as principle, and Samuel N. Holliday, as surety, are held and firmly bound

85 unto Lewis Smith in the full and just sum of five hundred

dollars, to be paid to the said Lewis Smith, his heirs, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves. our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals this eighteenth day of September, in the year of our Lord one thousand eight hundred and sixty-seven.

Whereas, lately at the August term, 1867, of the Supreme Court of the State of Missouri, in a suit depending in said court between Lewis Smith and the Hannibal & St. Joseph Railroad Company, judgment was rendered against the said Hannibal & St. Joseph Railroad Company. And the said Hannibal & St. Joseph Railroad Company having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Lewis Smith citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington
86 the first Monday of December next:

Now, the condition of the above obligation is such, that if the said Hannibal & St. Joseph Railroad Company shall prosecute said writ to effect, and answer all damages and costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

[SEAL.] JAMES CARR.
[SEAL.] SAM'L N. HOLLIDAY.

Approved by—

N. HOLMES,
Presiding Judge Supreme Court Mo. pro tem.

And on the reverse of said bond appears the following endorsement, to wit:

Bond for a writ of error. Hannibal and St. Joseph R. R. Co. *vs.* Lewis Smith. Wm. M. Albin, cl'k, by L. R. Lancaster, D. C.
Filed Sept. 25th, 1867.

87 STATE OF MISSOURI, *ss:*

I, William M. Albin, clerk of the Supreme Court of the State of Missouri, held at St. Joseph, do certify that the annexed and foregoing is a full and complete exemplification of the record, proceedings, and judgment, and all things concerning the same, had in said court, in the cause therein mentioned, as they remain of record and on file in the office of the clerk of said court.

Given under my hand and the seal of said court, at office, in the city of St. Joseph, this fourth day of October, 1867.

[SEAL.] WM. M. ALBIN, *Cl'k.*
Per L. R. LANCASTER, *D. C.*

I also certify that the original bond and also a copy of the annexed writ of error were duly deposited, and filed in the clerk's office of

said court on the 25th day of September, in the year of our Lord eighteen hundred and sixty-seven.

Given under my hand and seal aforesaid this day and date above-written.

[SEAL.] WM. M. ALBIN, *Clerk.*
Per L. R. LANCASTER, *D. C.*

88 UNITED STATES OF AMERICA, *ss:*

President of the United States to the honorable the Judges of the Supreme Court of the State of Missouri, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Supreme Court before you, at August term, 1867, between the Hannibal & St. Joseph Railroad Company, appellant, and Lewis Smith, respondant, a manifest error hath happened to the great damage of the said The Hannibal & St. Joseph Railroad Company; as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December, next, in the taid Supreme Court, to be thrn and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the Honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this eighteenth day of September, in the year of our Lord one thousand eight hundred and sixty-seven.

Issued at office, in the city of St. Louis, with the seal of the Circuit Court of the United States for the district of Missouri, dated as aforesaid.

[SEAL.] BEN. F. HICKMAN.
Clerk C. C. U. S. Missouri District.

Allowed by—

N. HOLMES,
Pres'd'g Judge pro tem. of the Sup. Court of Mo.

89 THE STATE OF MISSOURI, *ss:*

In obedience to the command of the within writ, I, William M. Albin, clerk of the Supreme Court of the State of Missouri, held at St. Joseph, herewith forward to the Supreme Court of the United States, held at Washington, a full, true, and complete transcript of the record and proceedings in the case of the Hannibal & St. Joseph Railroad Company, appellant, against Lewis Smith, respondant, as fully as the same remain of record and on file in my office.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of the Supreme Court of the State of Missouri, held at St. Joseph, at office, this 4th day of October, A. D. 1867.

[SEAL.] WM. M. ALBIN, *Cl'k.*
By LITT R. LANCASTER, *D. C.*

Endorsed: Filed Sept. 25th, 1867, Wm. M. Albin, cl'k, L. R. Lancaster, D. C.

90 THE UNITED STATES OF AMERICA:

To Lewis Smith, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the Supreme Court of Missouri, at St. Joseph, wherein the Hannibal & St. Joseph Railroad Company are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Nathaniel Holmes, pres'g judge, pro tem. of the Supreme Court of Missouri, this 18th day of September, in the year of our Lord one thousand eight hundred and sixty-seven.

N. HOLMES.

STATE OF MISSOURI, *County of Macon, ss*:

This day personally appeared the undersigned, clerk of the Circuit Court within and for the county and State aforesaid, Joseph M. Willis, who, being by me first duly sworn according to law for that purpose, deposes and says: That he served the within citation and monition on the within-named Lewis Smith by reading the same to him, and also by delivering to him a true copy of the same in said county and State on the 20th day of September, A. D. 1867.

J. M. WILLIS.

Subscribed and sworn to before me this 20th day of September, A. D. 1867.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said court, at office, in Macon, Sep. 20, 1867.

[SEAL.] J. M. LOUDON, *Clerk.*

91 Supreme Court of the United States, in error, of December term, A. D. 1867.

THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, plaintiff in error,
vs.
LEWIS SMITH, defendant in error.

Afterwards, to wit, on the first Monday of December, in this same term, before the justices of the Supreme Court of the United

States, at the Capitol, in the city of Washington, comes the said Hannibal & St. Joseph Railroad Company, by Sidney Bartlett, its attorney, and says that in the record and proceedings aforesaid there is manifest error, in this:

1. That the Circuit Court of Macon county, in the State of Missouri, on the trial of said cause, admitted improper and illegal testimony on behalf of the defendant in error.

2. That said court rejected proper and legal testimony offered by the plaintiff in error.

3. That said court made improper and illegal declarations of law on the part of the defendant in error.

4. That said court refused to make proper and legal declar-
92 ations of law offered by the plaintiff in error.

5. That said court found against the evidence.

6. That said finding was against the law.

7. That said finding was against both law and evidence, and against the law under the evidence.

8. That said finding was against the weight of evidence.

9. That said court overruled the motion for a new trial made by the plaintiff in error.

10. That by the record aforesaid it appears that the judgment aforesaid given was given for the defendant in error against the plaintiff in error.

Whereas, by the law of the land, the said judgment ought to have been given for the plaintiff in error against the defendant in error; and the said Hannibal and St. Joseph Railroad Company, plaintiff in error, as aforesaid, prays the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that
93 it may be restored to all things which it hath lost by occasion of the said judgment.

SIDNEY BARTLETT,
(With whom are JAMES CARR
and W. P. HALL.)
Attorney for Plaintiff in Error.

Endorsed: 379. Supreme Court, U. S., December term, 1867. Assignment of error. Hannibal & St. Joseph R. R. Co., pl'ff in error, *vs.* Lewis Smith. Filed Dec. 23, '67.

O

Miller. No 2

In the Supreme Court of the United States.

HANNIBAL & ST. JOSEPH RAILROAD COMPANY, *Plaintiff in Error*,
vs.
LEWIS SMITH, *Defendant in Error.*

Error to the Supreme Court of Missouri.

Brief of C. D. Drake for Defendant in Error.

I. The act of Congress of September 18, 1850, was a present grant of Swamp lands to the States in which they lay.

The second section, authorizing selections of the lands and patents therefor, was only for the purpose of settling the fact that the lands were swamp lands.

9 *U. S. Statutes at Large*, 519.
Rev. Statutes of Missouri of 1855, *p.* 1,005.
Allison vs. Halfacre, 11 *Iowa*, 450.
Whitesides vs. State's Att'y, 31 *Illinois*, 68.
Fletcher vs. Pool, 20 *Ark.*, 100.
Hempstead vs. Underhill, 20 *Arkansas*, 337.
Fore vs. Williams, 35 *Mississippi*, 533.
Aubuchow vs. Ames, 27 *Missouri*, 89.
Dunklin County vs. County Court, 23 *Missouri*, 453.
Lessieuer vs. Price, 12 *Howard*, 60.

II. The swamp lands and railroad having both been granted to the State, and the State having, before granting the railroad land to the Hannibal and St. Joseph Railroad, granted the swamp lands to the several counties, the railroad received the land granted, subject to the previous grant of the swamp lands to the counties.

Revised Statutes of Missouri of 1855, *p.* 1,005.

C. D. DRAKE,
Att'y for Defendant.

Miller Lewis Abst 2

Supreme Court of the United States.

The Hanibal and St. Joseph R. R. Co.,

Plaintiff in Error,

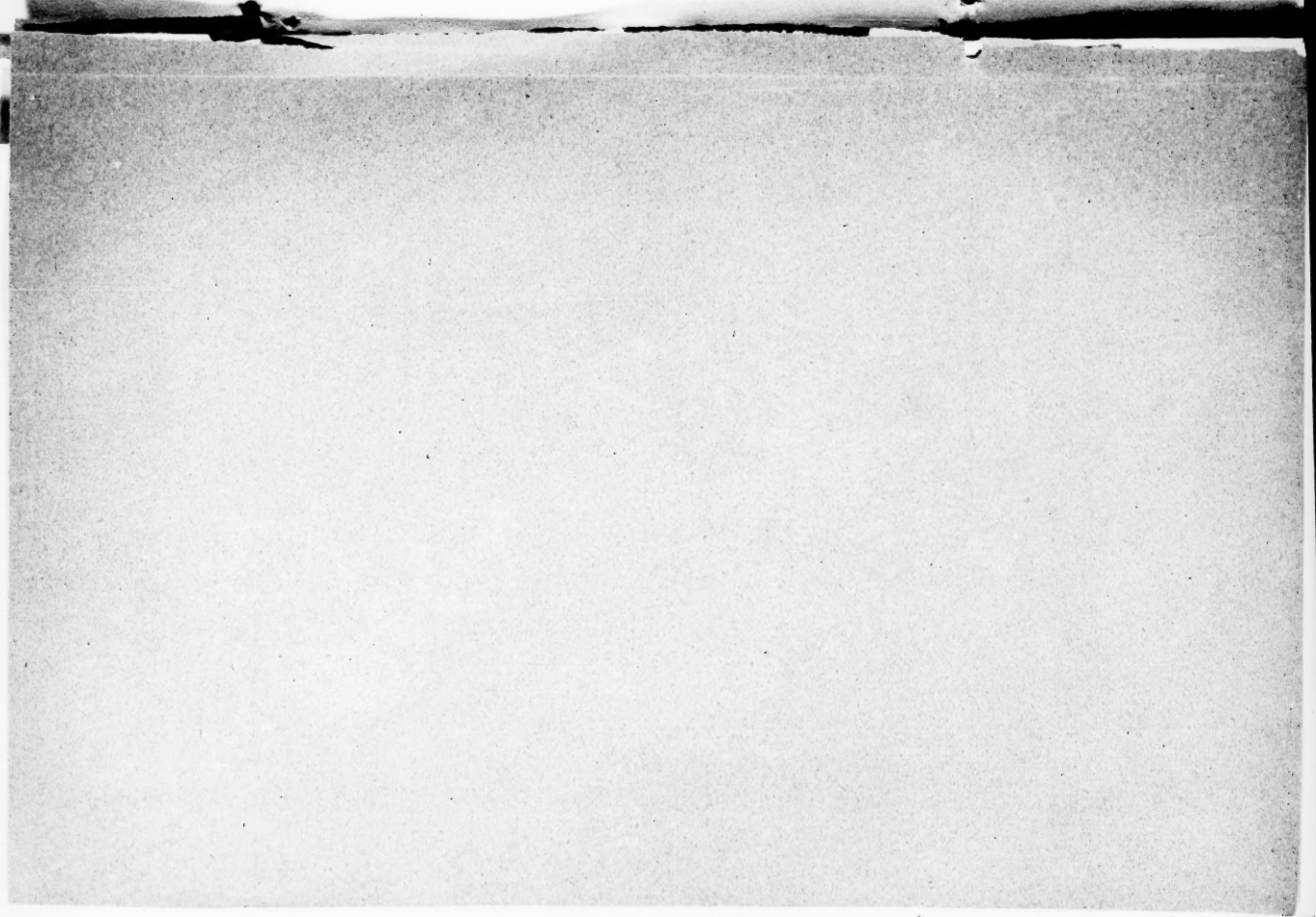
AGAINST

LEWIS SMITH,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

Washington:
INTELLIGENCER PRINTING HOUSE,
401 and 403 D Street, near 7th.
1869.



In the Supreme Court of the United States.

THE HANNIBAL AND ST. JOSEPH RAILROAD CO., Pl'ff in Error, *against* LEWIS SMITH, Defendant in Error. } *Error to the Supreme Court of the State of Mo.*

STATEMENT OF THE CASE BY PLAINTIFF.

This was an action of ejectment instituted in the Macon Circuit Court of Missouri, by the Hannibal and St. Joseph Railroad Company against Lewis Smith, to recover possession of parts of section twenty, of township fifty eight, of range sixteen, said lands being situate in said county.

The title of the Hannibal and Saint Joseph Railroad Company is deduced from an act of Congress, entitled "An act granting the right of way to the State of Missouri, and a portion of the public lands to aid in the construction of certain railroads in said State," approved June 10, 1852. This act granted to the State of Missouri, for the purpose of making a railroad from the town of Hannibal, Missouri, to the town of St. Joseph, Missouri, every alternate section of land designated by even numbers on each side of said road.—(Lester's Land Laws, p. 183, No. 196.)

The Legislature of Missouri, on the 12th day of September, 1852, passed an act entitled "An act to accept a grant "of land to the State of Missouri, by the Congress of the "United States, to aid in the construction of certain railroads "in the State, and apply a portion thereof to the Hannibal "and St. Joseph Railroad." The last recited act vests in the Hannibal and Saint Joseph Railroad Company all that portion of land granted by Congress to the State of Missouri,

which is applicable to the construction of a railroad from Hannibal to St. Joseph.—(Laws of Missouri of 1853, page 15, Railroad Laws of Missouri, 115.)

The Hannibal and St. Joseph Railroad Company by a resolution of its board of directors, on the 7th of March, 1853, accepted said act of the Missouri Legislature, (p. 5 of record;) and said company proceeded to construct their railroad and in all respects complied with said act of Congress, and the act of the Missouri Legislature, and completed their road in February, 1859, and the land in suit is within six miles of said road.—(See pp. 5 and 6 of printed record.)

On the 18th of November, 1854, the Commissioner of the General Land Office certified that the land in suit was an alternate section designated by even numbers remaining unsold and undisposed of within six miles of the said road, from the town of Hannibal to the town of St. Joseph, the survey and location of which had been filed in his office in pursuance of said act of Congress, and recommended that said lands be approved to the State of Missouri, subject, however, to any valid interfering rights. This recommendation of the Commissioner was approved by the Secretary of the Interior, subject to any valid interfering rights, on the same day.—(See pp. 6 and 7, of printed record.)

On the 19th of May, 1856, the Commissioner of the General Land Office certified said action of the Commissioner and of the Secretary, to said State, in conformity with the provisions of the act of Congress entitled "An act to vest in the several States and Territories the title, in fee simple, of the lands which have been or may be certified to them," approved August 3, 1854, (p. 7 of record.) The act of Congress, last aforesaid, is found at p. 236 of Lester's Land Laws, No. 249.

The foregoing is the title of plaintiff.

The title of defendant, Smith, is deduced from the act of Congress entitled "An act to enable the State of Arkansas

"and other States to reclaim the swamp lands within their "limits," approved September 28, 1850, (Lester's Land Laws 169, No. 182,) and also from the acts of the General Assembly of the State of Missouri, donating certain swamp and overflowed lands to the counties in which they lie, approved March 3, 1851, and December 13, 1855.—(Laws of Missouri of 1851, p. 238, Rev. Statutes of Missouri of 1855, p. 1,005.)

The lands in suit are situate in Macon county, Missouri. On the 4th day of May, 1852. the county court of said county appointed one Butler, Commissioner to select the swamp lands for said county. On the 7th of February, 1853, said Butler reported to said county court, that he had selected the land in suit, among other lands, as swamp and overflowed land belonging to said county, and this report was approved on the day on which it was made, (pp. 8 and 9 of printed record.)

On the 5th day of September, 1855, said county court ordered the sheriff to sell the swamp and overflowed land belonging to said county. (See page 9 of the Record.)

On the 3d of October, 1855, said sheriff issued a certificate to one Milsaps stating that he had made proof of an improvement of the land in suit, and that he would be entitled to a patent for said land on payment of the purchase money.

On the 13th of April, 1857, said Milsays assigned said certificate to the defendant, Lewis Smith. (See page 8 of printed Record.)

On the trial of the cause defendant introduced evidence tending to prove that the lands in suit were wet and unfit for cultivation at the date of the swamp-land act of 1850. This is the title of the defendant. No evidence was introduced by defendant tending to show that the land in suit was ever certified as swamp land by the Secretary of the Interior, or that the same was ever patented to the State of Missouri as swamp land, nor is it pretended that such is the fact.

which is applicable to the construction of a railroad from Hannibal to St. Joseph.—(Laws of Missouri of 1853, page 15, Railroad Laws of Missouri, 115.)

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The foregoing is the title of plaintiff.

The title of defendant, Smith, is deduced from the act of Congress entitled "An act to enable the State of Arkansas

"and other States to reclaim the swamp lands within their "limits," approved September 28, 1850, (Lester's Land Laws 169, No. 182.) and also from the acts of the General Assembly of the State of Missouri, donating certain swamp and overflowed lands to the counties in which they lie, approved March 3, 1851, and December 13, 1855.—(Laws of Missouri of 1851, p. 238, Rev. Statutes of Missouri of 1855, p. 1,005.)

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On the 5th day of September, 1855, said county court ordered the sheriff to sell the swamp and overflowed land belonging to said county. (See page 9 of the Record.)

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On the 13th of April, 1857, said Milsays assigned said certificate to the defendant, Lewis Smith. (See page 8 of printed Record.)

On the trial of the cause defendant introduced evidence tending to prove that the lands in suit were wet and unfit for cultivation at the date of the swamp-land act of 1850. This is the title of the defendant. No evidence was introduced by defendant tending to show that the land in suit was ever certified as swamp land by the Secretary of the Interior, or that the same was ever patented to the State of Missouri as swamp land, nor is it pretended that such is the fact.

Under this state of the evidence the plaintiff asked the Circuit Court (which tried the case without a jury by agreement of parties) to declare the law as follows:

1. Under the act of Congress entitled "an act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," approved September 28, 1850, the title to the land in controversy could not be divested out of the United States until an accurate list and plat of said land had been made out by the Secretary of the Interior, and the same transmitted to the Governor of the State, and, at the request of said Governor, said Secretary had caused a patent to be issued to the State therefor, in pursuance of the 2d section of the act aforesaid.

REFUSED.

2. If the Court believes from the evidence that said land is a part of the land granted to the State of Missouri by the act of Congress entitled "an act granting the right of way to the State of Missouri and a portion of the public lands to aid in the construction of certain railroads in said State," approved June 10, 1852, and by the act of the Legislature of the State of Missouri granted to the Hannibal and St. Joseph Railroad Company by the act entitled "an act to accept a grant of land made to the State of Missouri by the Congress of the United States to aid in the construction of certain railroads in the State, and apply a portion thereof to the Hannibal and St. Joseph railroad," approved September 20th, 1852, and that plaintiff accepted said act and all grants therein contained by a resolution of its board of directors on the 7th day of March, 1852, and that a copy of said resolution was filed in the office of the Secretary of State, as prescribed by the 4th section of the last-mentioned act, and that a copy of the location of the plaintiff's railroad was made and certified by plaintiff's president and chief engineer, under the corporate seal of the plaintiff, and forwarded and filed in the office of the Commissioner of the

General Land Office on the 10th day of June, 1853, as prescribed by the 1st section of the act of Congress and the 2d section of the act of the Missouri Legislature aforesaid, and that said land is within six miles of the plaintiff's railroad, as located, and that said railroad was completed in 1859, and if the court further believes from the evidence that said several acts mentioned in this instruction had been done prior to the issuing of a patent to the State of Missouri for said land, as laid down in the first instruction, then the title to the said land is vested in the plaintiff, and the Court will find for plaintiff.

REFUSED.

3. Under the act of Congress entitled "an act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," approved September 28th, 1850, the title to said land could not be divested out of the United States until evidence had been filed with the Commissioner of the General Land Office showing it to be swamp and overflowed lands within the provision of said act, and a patent issued therefor, or after the filing of said evidence until the passage of the act of Congress of the 3d of March, 1857, confirming the title thereto in the State without any patent, and if the Court believes from the evidence that the plaintiff had complied with and performed the several acts on its part specified, in the act of Congress entitled "an act granting the right of way to the State of Missouri and a portion of the public land to aid in the construction of certain railroads in said State," approved June 10th, 1852, and of the acts of the Legislature of the State of Missouri, entitled "an act to accept a grant of land made to the State of Missouri by the Congress of the United States to aid in the construction of certain railroads in this State, and apply a portion thereof to the Hannibal and St. Joseph railroad," approved September 20th, 1852, and said land lies within six miles of the plaintiff's railroad as located, and said rail-

road was located prior to the institution of this suit and prior to the issuing of said patent or filing the evidence in the office of the Commissioner of the General Land Office, as aforesaid, and prior to the passage of said act of Congress confirming the title to said land to the State of Missouri, then the title thereto is vested in the plaintiff and the Court will so find.

REFUSED.

4. If the Court believes from the evidence that said land is a part of the land granted to the State of Missouri by the act of Congress, as aforesaid, approved June 10th, 1852, and by the act of the Legislature of the State of Missouri, as aforesaid, approved September 20th, 1852, and that said land lies within six miles of plaintiff's railroad as located, and said railroad was completed prior to the institution of this suit, then the Court will find for plaintiff.

GIVEN.

5. To constitute land overflowed within the purview of the law, the same must be so overflowed during the planting, cultivating, and growing seasons of each year as to be made unfit thereby for cultivation without constructing levees and drains to reclaim the same.

REFUSED.

6. To constitute land swamp within the purview of the law, the same must be so wet and marshy during the planting, cultivating, and growing seasons in each year as to be made unfit thereby for cultivation without levees and drains to reclaim the same.

REFUSED.

7. To constitute land overflowed within the purview of the law, the same must be so overflowed during the planting, cultivating, and growing seasons, during a majority of years, so as to be made unfit thereby for cultivation, without constructing levees and drains to reclaim the same.

GIVEN.

8. To constitute land swamp within the purview of the law, the same must be so wet and marshy during the planting, growing, and cultivating seasons in a majority of years as to be made unfit thereby for cultivation without constructing levees and drains to reclaim the same.

GIVEN.

9. If the Court believes from the evidence that said land is neither swamp nor overflowed, as defined in instructions numbered 5 and 6, it will find for plaintiff.

REFUSED.

10. If the Court believes from the evidence that said lands are neither swamp nor overflowed, as defined in instructions numbered 7 and 8, it will find for the plaintiff.

The Court gave the declarations of law numbered 4, 7, 8, and 10, and refused to give the other declarations of law and plaintiff excepted.

The defendant then asked the Court to declare the law as follows:

1. That if the lands sued for were, on the 28th day of September, 1850, swamp or overflowed lands, and thereby rendered unfit for cultivation, then the act of Congress of that date was a present absolute grant thereof to the State of Missouri, and were, by the acts of the Legistature of 1851, conveyed to Macon county and plaintiff has no title thereto.

GIVEN.

2. That the State of Missouri having conveyed to Macon county the swamp lands therein, and having conveyed subsequently to the Hannibal and St. Joseph Railroad Company land granted by Congress to the State for railroad purposes, that even though the act of Congress granting swamp lands to the State of Missouri was a conditional grant, yet the absolute grant of said lands by the State to the counties is a qualification and limitation of the grant to the Railroad

company, and the grant to the railroad company from Missouri, was made subject to the previous grant by Missouri of the swamp lands.

GIVEN.

3. That the act of Congress granting railroad lands was made subject to the act granting swamp lands to the State, and swamp lands were not included in the grant of land for railroad purposes.

GIVEN.

The Court declared the law as asked by defendant, and plaintiff excepted.

The Circuit Court of Macon county gave judgment for defendant, and plaintiff appealed to the Supreme Court of Missouri, which is the court of last resort in that State. The Supreme Court of Missouri decided against the title of plaintiff, claimed under the act of Congress of June 10th, 1852, and affirmed the judgment of the court below, and the plaintiff brings the case here by writ of error.

POINTS AND AUTHORITIES ON PART OF THE PLAINTIFF, THE HANNIBAL AND SAINT JOSEPH RAILROAD COMPANY:

1. The certificates of the Commissioner of the General Land Office and of the Secretary of the Interior, given in evidence in this case, vest the title to the land in suit to aid the Hannibal and Saint Joseph Railroad Company. Act of Congress of August 3, 1854. Lester's Land Laws, p. 236, No. 249.

2. The swamp land act of 1850 does not vest any title to the swamp lands in any State, until the Secretary of the Interior shall have made out an accurate list and plat of the lands, and issued a patent to the State therefor. (Second section, act of 1850; Lester's Land Laws, p. 169, No. 182; Foley v. Harrison, 15 How., 447; Rrice v. Railroad, 1 Black, 375, et seq.; Parsons v. Commissioners, 9 Wiscon-

sin, 236; Murphy v. Ewing, 23d Ind., 301; Funston v. Metcalf, 40 Mississippi, 507; H. & St. J. R. R. Co. v. Smith, p. 24 and 25 of Record; Dart et al. v. Hercules, 34 Ill., 403; 31 ib. 68, 10 La. An., 135.) This is the settled construction of the act of 1850, by both the Legislative and Executive Departments of the Government of the United States. (26th vol. Cong. Globe. pp. 610 and 618; 30th vol. Cong. Globe, pp. 966 and 969 and 986 and 990; Report of Com. of General Land Office, Nov. 26, 1851; Senate Doc., 1851 and 1852, vol. 3, part. 1, page 18, No. 1; Opinion of Sec. of Interior; Lester's Land Laws, p. 549, No. 578.)

3. The act of 28th of September, 1850, does not set apart any particular tracts of land, either as granted or reserved. The description of "swamp and wet lands thereby rendered unfit for cultivation," as explained by the 3d section of that act, is most indefinite, and a careful selection was necessary to identify those lands. Nothing in the act deprives the officers who are charged with the duty of executing the land laws of their control over these selections, in order to see that they are made by legal subdivisions; that the greater part of each tract is unfit for cultivation, by reason of its being wet or overflowed; that the lands claimed have not been sold or otherwise disposed of by the United States, &c. On the contrary, the act expressly imposes on the Secretary of the Interior the duty of supervising the swamp land selection, and it is only on his approval and the issuing of a patent that the final severance from the public domain of the lands so selected takes place. Until then the swamp lands remain a part of the public lands subject to sale, gift, or grant by the United States as other public lands. (1 Black, 375; 23 Ind., 301; 15 How., 447; 26 Cong. Globe, 610 and 618; 30 Ib., 966, 969, 986, 990; Foley v. Harrison, 5 La. An., 87, 88, 89; 10 La. An., 135.)

4. The Secretary of the Interior never having patented the land in suit as swamp land, and never having approved of its selection as swamp land, the defendant, who claims said land under the act of 1850, has no title, legal or equita-

ble, and he is not therefore in a condition to contest the title of plaintiff, which is regular on its face. (Doll v Meador, 16 California, 324, et seq.; Mitchell v. Parker, 25, Mo. 34; Robbins v. Eckler, 36, Mo. 506; Beard v. Federy, 3 Wallace, 486.)

5. The power to determine what are and what are not swamp or wet lands under the act of 1850, is given solely and exclusively to the Secretary of the Interior. He alone has the power to determine on what specific tracts the act shall operate as a grant. This is a political function, and is beyond the control of the courts, and his decision, as to the character of said lands under said act, is final and conclusive. The act of August 3d, 1854, did not change the law of 1850, in this or any other respect. (West v. Cochrane, 17 How., 403; Maguire v. Tyler, 1 Black, 195; Stanford v. Taylor, 18 How., 409; Menard v. Massey, 8 How., 293; Lafayette v. Kenton, 18 How., 59; Scuddy v. Shaffer, 10 La. An., 135.)

6. The act of 1850 having given the Secretary of the Interior the sole and exclusive power of determining what lands are within its provisions, it follows that no lands can properly be considered as granted or reserved under that act, until the Secretary has determined that they are swamp or wet within its terms.

7. If it be admitted that the State of Missouri did acquire a right to the lands in suit by the passage of the act of 1850, yet that right has become barred in consequence of the State having failed to select the lands within the time prescribed by the act of March 12, 1860. (U. S. at Large, vol. 10, p. 3.)

PLAINTIFF'S BRIEF.

The plaintiff in this case has complied with all the conditions of the act of Congress of June 10, 1852, and of the

Missouri Legislature of September 20, 1854. The lands in suit are parts of an alternate section, designated by even numbers, within six miles of the Hannibal and St. Joseph Railroad, and so certified by the Land Department. And there is no doubt but that the title to said lands is in plaintiff, unless it passed by the swamp land act of 1850, or unless the latter act amounted to a reservation of the lands therein mentioned. This entire controversy, therefore, depends on the proper construction of the act of 28th of September, 1850, granting the swamp and overflowed lands to the States therein designated. The defendant insists that the swamp land act was a present absolute grant of the swamp lands within their limits, to the several States, and that all that is necessary to make out the title of any State to its swamp lands is to prove to the satisfaction of a jury that the lands were wet and unfit for cultivation on the 28th of September, 1850. The plaintiff maintains, on the other hand, that no title to the swamp lands vests until either a patent issue, or until, at least, an accurate list or plat of the lands has been made out by the Secretary of the Interior. And the chief question to be decided by this court is, as I understand it, which of these constructions is the proper one.

If the first section of the act of 28th of September, 1850, should be considered alone, there would be great force in the position of the defendant. But when the whole act is considered together, the defendant's views cannot be sustained.

The first section of the act is in these words:

"That to enable the State of Arkansas to construct the "necessary levees and drains to reclaim the swamp and over-"flowed lands therein, the whole of the swamp and over-"flowed lands, made unfit thereby for cultivation, which "shall remain unsold at the passage of this act, shall be and "the same are hereby granted to said State." The other sections of the act extend its provisions to Missouri and other

States But how, when, at what time, the title shall vest in the States is plainly and distinctly stated by the second section of the act, which is as follows:

"That it shall be the duty of the Secretary of the Interior, "as soon as may be practicable after the passage of this act, "to make out an accurate list and plat of the lands described "as aforesaid, and transmit the same to the Governor of the "State of Arkansas, and at the request of the said Governor "cause a patent to be issued therefor, and on that patent "the fee simple to said lands shall vest in said State of Ar- "kansas, subject to the disposal of the Legislature thereof." This section declares that the title shall not vest until a patent issues. The exact language is, "The Secretary of the "Interior shall cause a patent to be issued, and thereupon "the fee simple to said lands shall vest in the State." If the fee simple vests on issuing the patent, it cannot vest before that time. The meaning of the section, therefore, is that the title shall not vest until the patent issues. And the swamp land grant comes directly within the rule laid down in the case of Rice vs. Railroad Company, 1 Black, 375 et seq.

This view of the subject is greatly strengthened by the third section of the act which provides "That in making "out a list or plats of the land aforesaid, all legal subdivi- "sions, the greater part of which is wet and unfit for "cultivation, shall be included in said list and plats, but "when the greater part of said subdivision is not of that "character, the whole of it shall be excluded therefrom."

This section imposes a very great and important labor on the Secretary of the Interior. It frequently requires a very nice examination to determine whether a particular tract of land is or is not wet land within the meaning of the statute. If more than a moiety is wet and thereby unfit for cultivation, the whole tract is pronounced wet. But if a moiety is dry, then the whole tract is considered dry, and the differ-

ence of a single acre gives character to an entire subdivision. A single acre more wet shall make it all wet, and a single acre more dry shall make it all dry, according to the provisions of the law. Who then is to determine this question? Who is to decide whether a tract of land is wet or dry under the act? Who is to hear the evidence and pronounce judgment? Not the Governor of the interested State, for he would probably favor his constituents; not the local courts, for they would incline the same way; not a jury of the neighborhood, for experience tells us they would almost certainly give a verdict against the United States; not the Federal judiciary, because the interest of all parties require a more speedy settlement of these questions than could be had in that mode. Who, then, was to decide the controversy? The law says it shall be the Secretary of the Interior. The United States were giving away millions of acres of the public land. They were making a munificent grant to the new States. But they did not intend to give away everything. They, therefore, fixed a limit to the grant, and the land granted had to be separated in some way from the land not granted. That limit was that no land should pass which did not in the opinion of the Secretary of the Interior come within the purview of the act. This was a reasonable and proper provision to secure from abuse the liberality of Congress, and the grantees had no right to complain of it. It was for them to accept or reject the grant. If they choose to accept it, they accepted it with all its conditions and restrictions.

It has always been a cherished object with the Government of the United States to adopt such rules and regulations with reference to the disposal of the public domain, as would prevent, as far as possible, conflicts of title. Our admirable land system has been eminently successful in that respect. If, however, the defendant is right in this case, Congress made a wide departure from the practice of the Government

when it passed the swamp land act. Under his construction, the act of 28th of September, 1850, was the most thorough scheme that the wit of man could devise for producing confusion, strife, and litigation. In the case of railroad and other similar grants it is easy for the executive to avoid and prevent conflicts of title. The President can, and usually does, in those cases, withdraw from market a belt of land sufficiently wide to include the railroad grants. The railroad lands are then selected, and after the selections are made the lands are restored to market. But in the case of the swamp lands it was impossible to adopt this course. There was not a river, nor a rivulet, nor a lake, nor a pond, in the new States which did not furnish more or less land for the act of 1850 to operate upon. And if that act is an absolute grant in presente of the swamp lands, as is contended for by defendant, the only possible way to avoid conflicts between the purchasers of lands from the United States and the States claiming the swamp lands was to withdraw all the public lands from market. Congress gave the President no power to do this. But Congress did better than that. They adopted the 2d section of the act. That section was intended to prevent conflicts of title. It was necessary for that purpose, and it is all that was necessary. It was a wise precaution. It provides that no title shall vest in the States until the Secretary approves the selections and issues a patent therefor. Until that time it leaves the swamp lands a part of the public domain to be disposed of as other public lands. This section of the law, if properly administered, would prevent all trouble about titles. The United States would continue to dispose of the public lands in the usual way. The States would go on to select their lands. When the selections were made by the States they would be submitted to the Secretary for his approval or disapproval. If he found that the United States had not sold the lands or otherwise disposed of them, and that they were wet lands

within the meaning of the law, he would make out his list and issue a patent accordingly. If, on the other hand, the Secretary should find that the United States had disposed of the lands, or that they were not wet lands within the meaning of the law, he would disapprove the State selections, and all would move on smoothly and harmoniously as was intended by the law.

The defendant is understood to say that the swamp land act is a present absolute grant, requiring nothing to perfect it except proving to the satisfaction of a jury that the lands were wet, and thereby unfit for cultivation at the date of the act. He says that neither the approval of the Secretary of the Interior nor the issuing of a patent, nor the selection of the land by the State is necessary to vest the title in the State. He sees nothing, and he reads nothing but the first section of the act. The second section is entirely ignored, and is regarded as mere verbiage, without force or meaning. According to him it is for a jury, and it is for a jury only to decide whether the lands claimed as swamp lands were so on the 28th of September, 1850. In other words, the whole administration of the swamp lands is, according to the construction, taken away from the land department of the United States, and is transferred to the local State tribunals and local juries.

The defendant is attempting to revive a construction that was repudiated more than twenty years ago by Congress, and that is fraught with mischief. After the passage of the swamp act the sales of the public lands went on as before. It was, on an average, eighteen months after the passage of the acts before the Legislatures of the proper States signified their acceptance of the provisions of the act, and made arrangements for complying with its conditions. (Douglas' speech, 30th vol. Congressional Globe, p. 988.) And even after the States accepted the grants it was years before the States reported their selections in full to the Secretary of the

Interior, and the land involved in this suit has never been reported to the Secretary as swamp land, even up to the present day, so far as appears by the record. There was nothing in any of the land offices showing what lands were wet, and thereby unfit for cultivation. Lands that were wet and unfit for cultivation in 1850, became very soon thereafter dry and fertile. This is shown by the evidence in this case. One of the witnesses swears that "land did not drain as soon "in 1850 as before, as since, more rain fell formerly than of "late years, the ground was then more marshy; vegetation "was very rank and prevented its dying off." (See Gilstrap's evidence, page 12 of printed record.) It was utterly impossible, therefore, for any one to tell what lands were wet in 1850, and what were dry, unless he was personally acquainted with the land itself. Still the land sales went on. Emigrants from the old States went to the new States to select homes. They choose lands that were dry and susceptable of cultivation. Perhaps many years before these lands had been wet, perhaps they were wet in 1850. But when selected by the settlers they were the very best lands in the country. Finding these lands vacant and no one claiming them, citizens went to the United States land offices, entered them, and paid their money for them. In some cases these lands were converted into farms. In other cases it may be that flourishing villages sprung up on them. In other cases the purchasers from the Government had sold with covenants warranting the title. When application was made for a patent to these lands by the settlers, the Secretary of the Interior, under a revised opinion that will be more particularly noticed hereafter, decided that the lands belonged to the States under the swamp land act. In this way a confliet between titles originated, involving millions of acres of land. The decision of the Secretary was so unjust and so illegal that Congress was appealed to and interfered. And on the 2d day of March, 1855, an act was passed entitled

"An act for the relief of purchasers and locators of swamp and overflowed lands," by which the President of the United States was directed to "cause patents to be issued, as soon "as practicable, to the purchaser or purchasers, locator or "locators, who have made entries of the public lands claimed "as swamp lands, either with cash, or with land warrants, or "with scrip, prior to the issue of patents to the State or "States, as provided for by the 2d section of the act ap- "proved September 28, 1850, entitled 'an act to enable the "State of Arkansas and other States to reclaim the swamp "lands within their limits,' any decision of the Secretary of "the Interior to the contrary notwithstanding." (10th vol. U. S. Statutes, 634; Lester Land Laws, p. 246, No.275.) This action of Congress, so eminently just and legal, is most potent as a cotemporaneous construction of the act of 1850 by one of the co-ordinate departments of the Government.

Although plaintiff insists that the title to the swamp lands did not vest in the States under the act of 1850, until a patent issued, yet it is not necessary to take that extreme position in order to defeat defendant's title. It is equally fatal to defendant, if the approval of the swamp land selections by the Secretary of the Interior was necessary to divest the title of the United States. For, in this case, the lands in suit have never been approved by the Secretary as swamp lands, but, on the contrary, he has certified them as railroad lands. The defendant, therefore, has no title under the swamp act by any rule of construction that is recognized by the courts. Taking that whole act together, and it would seem to be impossible to maintain that the approval by the Secretary of the lists and plats of the swamp lands was not necessary to the vesting of the title, even if it be conceded that a patent need not issue. That act did not take the control of the swamp lands from the Land Department of the United States. It does not set apart any particular tracts of land and separate them from the public domain. It is

difficult to imagine a more indefinite description of land than that "swamp and wet land, thereby rendered unfit for cultivation," as defined by the 3d section of the act of 1850. In order to identify the wet lands it was necessary to select them. For this purpose the States very properly employed agents. But the selections, when thus made, did not ipso facto separate the lands selected from the public domain. Nothing in the act deprives the officers, who are charged with the duty of executing the land laws, of the control over the selections made by the States, in order to see that they are made by legal subdivisions; that the greater part of each tract selected is unfit for cultivation by being wet or overflowed; that they have not been sold or otherwise disposed of by the United States, &c. On the contrary, the act expressly imposes on the Secretary of the Interior the duty of supervising the selections, and it is only on his approval and the issuing of a patent that the final severance from the public domain of the lands so selected takes place, and the title vests in the States.

This court well said, in a case similar to this, "it could "not have been the intention of the Government to relin- "quish the exercise of power over the public lands that "might be located by the State. The same system was to "be observed in the entry of lands by the State as by indi- "viduals, except the payment of the money, and this was "necessary to give effect to the act to prevent conflicting "titles." (Foley v. Harrison, 15 Howard, 447.)

The case of Rice against Railroad is, in most of its features, similar to this case, and the decision in that case, it seems to me, is decisive of this. There Congress passed an act granting to Minnesota, in its first section, without any limitation, certain lands for railroad purposes. In a subsequent section of the same act it was provided that no title should pass until a patent should issue, and this court decided that Minnesota acquired no title to such lands, either legal or equitable,

until the issuing of the patent. The reasoning of the court is so forcible and so applicable to the present suit that I quote a portion of the opinion: "Certain lands (say the court) are "granted to the territory by the first section, to be held by "it for a specified use and purpose, to assist the construction "of a specified public improvement, and to be exclusively "applied to that purpose, without any other restriction, ex- "cept that the lands could be disposed of only as the work "progressed. To carry out that purpose, the lands were de- "clared by the 3d section to be subject to the future disposal "of the territorial legislature, but that in no event, should "they inure to the benefit of any company previously con- "stituted and organized. Neither of these sections contain "any words which necessarily and absolutely vest in the "Territory any beneficial interest in the thing granted. "Undoubtedly the words are sufficient to have that effect, "and if not limited or restricted by the context, or other "parts of the act, they would properly receive that construc- "tion. But the word grant is not a technical word, like the "enfeoff, and although used broadly without limitation or "restriction, it would carry an estate or interest in the thing "granted, still it may be used in a more restricted sense. "* * * Whenever the words of a statute are am- "biguous, or the meaning doubtful, the established rule "of construction is, that the intention must be deduced from "the whole statute. Intention in such cases must govern "when it can be discovered, but in the search for it, the "whole statute must be regarded, and if it is practica- "ble, so expounded as to give effect to every part. That "rule cannot be applied in this case, if it be admitted, that "a beneficial interest in the lands passed to the Territory, "because it is expressly provided by the fourth section of "the act, that no title shall vest in the Territory of Minne- "sota, nor shall any patent issue for any part of the lands "until a continuous length of twenty miles of the road shall

"be completed. Unless that whole provision, therefore, be "rejected without meaning, or is repugnant to the residue of "the act, it is not possible, we think, to hold that the Ter- "ritory acquired a vested interest in the lands at the date of "the act; and yet the 4th section contains the same words "of grant as are found in the first and third, and no reason "is perceived for holding that they are not used in the same "sense. It is insisted that the provision does not divest the "grantee of a present interest; that it only so qualifies the "power of disposal, that the Territory cannot place the title "beyond the operation of the condition specified in the grant. "But they do not attempt to meet the difficulty, that by the "express words of the act, the absolute title remained in the "grantor, at least, until twenty miles of the road were com- "pleted, nor do they even suggest by what process of rea- "soning the four words, 'no title shall vest,' can be shorn "of their usual and ordinary signification, except to say, "that it would be doing great injustice to Congress to hold, "notwithstanding the word of the first section, that no title "passed to the grantee. Whether the provision be just or "unjust, the words mentioned are part of the act, and it is "not competent for the court to reject or disregard a ma- "terial part of an act of Congress, unless it be so repugnant "to the residue of the act, that the whole cannot stand to- "gether." (Rice v. Railroad, 1 Black, 375 and 376.)

The court, in the case last referred to, lay down another rule to be noted and remembered. They say that when the Government is the grantor, the grant must be construed most strongly against the grantee. And if the words of a Government grant are ambiguous, the true rule of construction is to resolve the doubt in favor of the grantor. (Ib. 379 and 380.) I am well aware that the defendant insists there is no ambiguity in the act of 1850. He points to the first section and says, here it is written, "All the swamp lands " * * * which shall remain unsold at the passage of

"this act be and the same are hereby granted." But we point to the second section and say here it is written, "The "Secretary of the Interior shall make out an accurate list "and plat of the lands, * * and cause a patent to be is- "sued therefor, and on that patent the fee * * shall vest "in the State."

If these two sections cannot be construed so as to stand together, as defendant seems to think, then they must be repugnant to each other, and the second section will control the first section. Because, in construing a statute, if there be a conflict between its provisions, the latter clause will control the former. (1 Blackstone's Com., 87; 1 Swift's Digest, p. 12, sec. 8, 9; Bacon's abridgment, Statutes, 243.)

In addition to this is the act of Congress, entitled "an act to extend the provisions of 'an act to enable the State of Arkansas and other States, to reclaim the swamp land within their limits, to Minnesota and Oregon, and for other purposes,'" approved March 12. 1860. The second section of the last mentioned act is in these words: "Sec. 2. And be "it further enacted that the selection to be made from lands "already surveyed in each of the States, including Minne- "sota and Oregon, under the authority of the act aforesaid, "and of the act to aid the State of Lousiana in draining the "swamp lands therein, approved March second, one thou- "sand eight hundred and fifty-nine, shall be made within "two years from the adjournment of the Legislature of each "State at its next session after the date of this act; and as "to all lands hereafter to be surveyed within two years from "such adjournment, at the next session after notice by the "Secretary of the Interior to the Governor of the State that "the surveys have been completed and approved."

The passage of this act was absolutely necessary to terminate the difficulties that were arising, and liable to arise continually under the swamp land act. The United States were selling and granting away these lands every day. The

States were, year after year, claiming the lands so sold and granted away, as swamp lands; and, as the lands were becoming more and more valuable every year, these conflicts were likely to become more and more numerous and mischievous. The act of 1860, therefore, wisely and properly limited the time within which the States should select the swamp lands. These lands were not merely to be selected by the States, but the selections were, of course, to be certified to the Secretary of the Interior, so that they might be examined and approved or disapproved. *The land in this case has never been selected as the law requires, even up to the present time.* It never has been claimed as swamp land of the United States, and the Secretary has never been requested by the State authorities to approve it as such. At least there is no evidence of any such thing in the record. And the only way the county authorities of Macon county pretended to select the land was, not to examine each tract separately, and to see whether the greater part of each subdivision was unfit for cultivation, as was contemplated by the act of 1850, but they run a line on each side of the Chariton river, and claimed all land within those limits as wet and overflowed lands, and the land in this suit happened to fall within those lines. (See pp. 8 and 9 of the printed record.) By the terms, then, of the act of 1850, the land in suit cannot be allowed to the State of Missouri as swamp land, and her claim to it as swamp land is forever barred.

It may not be without interest to inquire into the construction which has been given to the act of 28th of September, 1850, by the Legislative and Executive Departments of the Government. Soon after the passage of the act it became necessary for the General Land Office to construe it. This duty was performed, and Mr. Commissioner Butterfield thus announces his decision in his report of November 26, 1851:

"*Swamp Lands.*

"* * * * Whenever the selections in any one dis-
"trict shall be completed and closed, and the lists finally
"approved, and not before, it is designed to issue the patent
"required by the act; and any lands previously sold, or
"otherwise disposed of prior to the date of the approval of
"the lists, will be rejected and excluded, in accordance with
"the views recently expressed by this office, which have
"received the sanction of the Department."

This section was not acceptable to the States interested in the swamp lands, and the Secretary of the Interior was, after much difficulty, induced to modify his opinion. He, accordingly, on the 23d of December, 1851, issued a circular, from which the following is an extract:

"DEPARTMENT OF THE INTERIOR,
"WASHINGTON, *December* 23, 1851.

"SIR: I have carefully reviewed my affirmance of your
"decision in regard to the proper construction of the acts of
"22d of March, 1849, and 25th of September, 1850, grant-
"ing to the several States of the Union, the swamp and over-
"flowed lands within their respective limits, and am satisfied
"that the decision heretofore made was erroneous.

"The first question involved in the case is as to the pe-
"riod when the grants took effect, whether it be the date of
"the law, or the date of the approval of the selections by
"the Secretary of the Interior, or the issuing of the patent
"to the State. The language of the 1st section of the act of
"1849 is as follows: 'That to aid the State of Louisiana in
"constructing the necessary levees and drains, to reclaim
"the swamp and overflowed lands, which may be or are
"found unfit for cultivation, shall be, and the same are here-
"by, granted to that State, and the first section of the act
"of September 28th, 1850, is almost identical. The act of
"1849, in regard to Louisiana, declares that the fee simple
"in said lands shall vest upon the approval of the Secretary

"of the Interior; and the general law of September, 1850, "enacts that the fee shall vest in the State upon the issuing "of the patent. In each case the granting clause is in the "first section, and the words employed, viz: 'Are hereby "granted' seem to me to import a grant in presenting. They "confer the right to the land, though other proceedings are "necessary to perfect the title. When the selections are "made and approved, or the patent issued, the title thereby "becomes perfect and has relation back to the date of the "grant."—(Lester's Land Laws, 549, No. 578.)

Mark the language of the Secretary, "the words employed, "viz: 'are hereby granted' seem to me to import a grant "in presenti. They confer the right to the land, though "other proceedings are necessary to perfect the title." He makes a distinction between the right to the land and the title to the land, and says the approval of the Secretary, or the issuing of a patent is necessary to perfect the title. In this case we are dealing with titles, and not rights distinct from titles, so that the construction of the Commissioner and of the Secretary, are alike and equally fatal to the defendant. The construction of the Commissioner is fatal, because it holds that any sale or disposal of the swamp lands by the United States, before the selections are approved by the Secretary of the Interior, defeats the title of the State. The construction of the Secretary under date of December 23, 1851, is fatal, because it holds that *the title* does not vest in the State until the selections are approved by the Secretary of the Interior, or a patent issues. As I have already shown and stated before, the selection of the land in this suit as swamp land has never been approved by the Secretary, and under the act of March, 1860, it cannot be now approved as such. It may not be improper to say that the opinion of Secretary Stuart, above quoted, is the most favorable that has been obtained from the land department at any time, so far as I am informed, to the States claiming the swamp lands.

But Mr. Secretary Stuart's opinion very soon received the condemnation of Congress. On the 14th of February, 1853, the chairman of the Committee on Public Lands of the House of Representatives, reported to that body a bill, the object of which was to confirm the construction of the Secretary of December 23, 1851. The bill thus reported was violently assailed and rejected by a large majority of the House It was discussed at considerable length, and the views of the Secretary very severely criticised and condemned on the ground that the act of 1850 passed no title until a patent was issued. One of the most prominent members thus expressed himself:

"Here is the first section of the act * * * "That section declares precisely, what I have stated, that to "enable the States to reclaim and drain their swamp lands "rendered thereby 'unfit for cultivation,' said swamp lands "shall be granted to the different States. But how, when, "at what time the title shall vest is clearly, distinctly and "unequivocally stated in the second section."

This same gentleman, after alluding to the fact that lands claimed as swamp lands had been purchased by individuals since the date of swamp land act, proceeded as follows:

"The Secretary of the Interior has decided that these en- "tries are void, and the lands thus entered under the act in "question belong to the States. This conflict we are called "on to settle. * * * * There is no diffi- "culty about it. Their (the purchaser's) title is good against "the United States and against the State." This view was endorsed by the House of Representatives, (26 vol. Con. Globe, pp. 610 and 618.) The Secretary of the Interior, however, still adhered to his opinion, and the subject again came before Congress. As has already been shown, an act was passed in 1855, requiring the President to issue a patent to purchasers and locators of swamp lands, any opinion of the Secretary of the Interior to the contrary notwithstanding.

The merits of that act were a good deal discussed, especially in the United States Senate, and many distinguished and able men participated in the discussion. Mr. Benjamin, of Louisiana, used this strong and emphatic language: "A ques- "tion has been raised and something has been stated, by "some of my friends, in relation to the effect of the act of "Congress which conveyed the swamp lands to the States. "Now, as a lawyer, I have not the slighest doubt or hesita- "tion on the subject. I speak, perhaps, with greater force "of conviction than I ought on a question which is contest- "ed, from the fact that I argued that very point before the "Supreme Court at its last session, and I had it determined "in one of my own cases a few months ago. The law is, "according to that decision, that the State had no title to "those lands which would evict a purchaser under the general "Government, until the lands were designated and located "under the direction of the proper officer of the United "States land office, so as to designate the particular land in- "cluded by the grant of the general Government." And in the same discussion in answer to a question he said: "I do "not admit the Senator's proposition to the full extent which "he has just stated. I will state to the Senator, exactly "what my position is in regard to the title conveyed by the "act. It is an inchoate title, equitable in its nature, bind- "ing on the conscience of the government not to sell those "lands knowingly; but still so imperfect a title that an in- "innocent third purchaser giving his money for these lands "to the government, obtains a perfect title from it, until "they are designated."

Congress fully sustained these views of Mr. Benjamin, as is manifested not only by the passage of the act requiring the President to issue patents to the purchasers and locators of the swamp lands subsequent to the date of the act of 1850, but also by the debates on the subject, especially in the Senate. (30th vol. Congressional Globe, pp. 966, 969, 986, and 990.)

But it is said the State courts have settled the question. The State courts have decided that the swamp act of 1850 vests the title of the swamp lands "ex proprio vigore" in the States, and no patent and no approval by the Secretary of the Interior are necessary to give effect to the act. The best answer to this position is a reference to the decisions of the State courts themselves.

The Supreme Court of Wisconsin decided that it is "quite obvious that fee simple to the land does not vest in the State until the patent issues." (Parsons vs. Commissioners, 9 Wisconsin, 236.)

The Supreme Court of Indiana say: "It may be here "observed that there is no provision in the act of Congress "requiring the land offices to be closed, or any of the lands "in the various districts withheld from entry until the lists "and plats should be made out and transmitted to the Gov-"ernor of the State. It is presumed, therefore, that said "lands continued subject to entry at the various land offices "until such lists were made out, or the swamp lands selected "and the selections approved." (Murphy vs. Ewing, 23d Indiana, 301.)

The Supreme Court of Missouri held in this case "that "until the particular lands on which the act is to operate as "a grant of title shall be ascertained and designated in the "manner pointed out by the act itself, the grant cannot at-"tach to any specific tracts. Until then, there is no title "which can give the party a standing in court, either at law "or in equity." (p. 25 of printed record.)

The Supreme Court of Mississippi says: "The case of "Fore vs. Williams, 35 Mississippi, 553, places the validity "of the plaintiff's title upon the facts of the ascertainment, "location and approval required by the act of Congress, "which facts, it was held in that case, substantially ap-"peared.

"Without such approval by the Secretary of the Interior

"expressly appearing in evidence, or by necessary inference, "from a patent to the State for the particular land in contro- "versy, no title passed to the State." (Funston vs. Metcalf, 40 Mississippi, 507.)

The Supreme Court of Illinois say: "They (the lands) "being swamp lands, the title vested in the State, by the "act of Congress entitled 'an act to enable the State of Ar- "kansas and other States to reclaim the swamp lands within "their limits,' approved September 28, 1850. This act fully "vested the legal title of such lands as were selected and ap- "propriated under its provisions in the States." (Dart et al. vs. Hercules, 34 Ill., 403.)

The Supreme Court of Iowa says: "The act granting the "swamp lands operates, *ex proprio vogore*, to pass the title at "once. The subsequent selection and patenting is required "for the purpose of fixing the location and description." (Illison vs. Halfacre, 9 Iowa. 652.)

The Supreme Court of Arkansas hold in broad terms that the title to the State's swamp lands passed by the act, and no selection or approval was necessary to give effect to the act. The Supreme Court of California, after some conflicting decisions seem to settle down at last on the Arkansas position. (Branch vs. Mitchel, 24 Arkansas, 443; Summer vs. Dickinson, 9 California, 555; Kite vs. Tubbs, 23 California, 443; Owens vs. Jackson, 9 California, 322; 27 California, 87; 29 Il., 319; 31 Il., 461; 33 Ill., 465.)

The result then of the State decisions is this: Wisconsin, Indiana, Missouri, and Mississippi hold that no title to the swamp lands vests in the States until a patent issues, or until the selections are approved by the Secretary of the Interior.

Illinois holds that the title vests in such lands as are selected and appropriated according to the provisions of the act.

Iowa holds substantially the same as Illinois. It is true

that the Iowa court says "the title passes at once *ex proprio vigore*." But this expression is immediately qualified by the court. "The subsequent selection and patenting is required "for the purpose of fixing the location and description." There is no intimation that the location can be fixed by evidence before a jury, but it is clearly asserted that the location must be fixed by the selection of the Secretary of the Interior.

Arkansas and California alone hold that the title to the swamp lands can be determined by proving their character to the satisfaction of a jury.

To these decisions of the State courts should be added the decision of the Supreme Court of Louisiana, construing the act of 1849, which granted swamp lands to that State, and which is like the act of 1850 in most of its provisions. (See Lester's Land Laws, p. 150, No. 166.) The Supreme Court of Louisiana say, "As the second section of the act of 1849 declares, in express terms, that the fee simple in the lands shall vest in the State, and be subject to disposal of the Legislature on the approval of the Secretary of the Treasury, after certified lists should be made by the deputies and Surveyor General, it is contended by appellants that the construction placed on this act by the Secretary was erroneous. We do not consider it necessary to decide that question. *It is certain* that the Legislature could not have disposed of the land, as belonging to the State, under the provisions of that act, until she had complied with the conditions imposed on her by the act of Congress, *and until the approval of the Secretary of the Treasury.* (Scuddy vs. Shaeffer, 10 La. Am., 135. It is not too much to say, after this reference to the authorities, that the weight of State decisions is immensely in favor of plaintiff.

Having now shown that the act of 1850 requires the approval by the Secretary of the Interior of the list and plat of swamp lands, and the issuing of a patent as a condition

precedent to the vesting of any title in the States; having shown that the Land Department of the United States have always held that the approval of the Secretary was necessary before a perfect title vested under the act; having shown that Congress has construed the act of 1850 to authorize the sale and disposal of the swamp lands by the Government at any time before the selections were made by the States, and certified to by the Secretary of the Interior; having shown that this court has construed similar grants to vest no title until patents were issued; having shown that the State courts, in construing this very grant, have held the approval of the Secretary of the Interior necessary to the title of the States; having, finally, shown that whatever title the State of Missouri may have had to the land in controversy, was barred and defeated by the act of 1860, requiring the swamp lands to be selected within a certain line. I think it may be safely affirmed that defendant has utterly failed to make out his first defence—title in himself.

I shall now proceed to consider his second defence—title in the United States. The Supreme Court of Missouri, while holding that defendant has no title to the land sued for, also held that plaintiff has no title. That court decides that the act of 1850 is not a grant in presenti of the swamp lands, and that no title vests in the State until the list and plats are made out and approved by the Secretary of the Interior, and accepted by the Governor, But it at the same time decides that the act of 1850 is a reservation of the swamp lands, and that such lands did not pass, by virtue of the approval by the Secretary of the Interior, of them as railroad lands, under the act of 10th of June, 1852. This view is based upon a proviso in the latter act, which is as follows: "And provided further, that any and all lands "heretofore reserved by act of Congress, or in any other "manner, by competent authority, for the purpose of aiding in any object of internal improvement, or for any other pur-

pose whatever, be and the same are hereby reserved to the "United States from the operation of this act." It will be perceived that the proviso does not make any new reservation, but, merely, recognizes reservations before made, and excepts from the operation of the act those former reservations—"*lands heretofore reserved.*" On looking at the act of 1850, no word or expression is to be found which speaks of the swamp lands as reserved. These lands are granted, but they are granted only when certain things have been done. Until then the swamp lands remain a part of the public domain, in no manner severed from it by reservation or otherwise subject to sale, gift, grant, and disposal, as other public lands of the United States.

What is a reservation of any part of the lands of the United States? That question can be best answered in the language of this court. "Whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of the public land, and no subsequent law or proclamation or sale could be authorized to embrace it, or operate upon it, although no reservations were made of it." (Wilcox v. Jackson, 13 Peters, 498.) If, then, the swamp lands are reserved by the act of 1850, at all, they are not merely reserved from railroad grants, but they are reserved from sale also. The mischievous consequences of regarding the act of 1850 as a grant in presenti, in the sense contended for by defendant, have already been shown. But the same consequences result if it be regarded as a reservation of the swamp lands. As has been before stated, the land officers not being able to ascertain what lands were wet and unfit for cultivation, and what lands were dry, were every day selling lands that the States claimed as swamp lands, innocent purchasers were every day buying these lands, and to hold that titles thus acquired may be defeated at any time, and by any person, by proving to the satisfaction of a jury

that these lands were not fit for cultivation on the 28th of September, 1850, would produce an amount of litigation and injury that should be avoided if possible.

A reservation of any part of the public land is a severance of it from the mass of the public domain. The very idea of severing the reserved land from the rest of the public lands carries with it the idea of designating the land reserved, so that the officers of the United States Land Department can distinguish it and withhold it from sale. If it is not thus designated, it can, in no sense of the word, be severed, be appropriated, be set apart under the act of 1850; it was utterly impossible for the land officers of the United States, from any information to be found in their offices, to determine in a multitude of cases whether lands claimed by the States were swamp lands or not; nor can that fact be ascertained by any one without making the most careful investigation through means of witnesses. Congress was well aware of this difficulty when the act of 1850 was passed. And, therefore, in the act itself is a means provided by which the swamp and wet lands shall be designated. They can be designated in no other way, simply because that is the only mode authorized by the law. Until the swamp lands are designated they remain a part of the public domain, subject to sale or grant by the Federal Government. (23 Ind., 301.)

The Supreme Court of Missouri distinctly say that under the act of 1850 "the power to determine on what specific "tracts of land it shall operate as a grant of title is given to "the Secretary of the Interior. This is a political function, "and is beyond the control of the courts." (Page 25 of printed record; West vs. Cochrane, 17 How., 403; Magwire vs. Tyler, 1 Black, 195; Stanford vs. Taylor, 18 How., 409; Menard vs. Massey, 8 How., 293; Lafayette vs. Kanton, 18 How., 59.) Here, then, is an emphatic avowal that the Secretary of the Interior can alone determine whether a particular tract of land is wet and overflowed, so as to vest

the title in the State, under the swamp act. That position is abundantly sustained by the authorities. But the Supreme Court of Missouri at the same time held that whether a particular tract of land is wet and overflowed, so as to be reserved under the Swamp act, is a question for the courts. In other words, if a State claims title to swamp lands it must submit that claim to the Secretary of the Interior. But if the State attempts to defeat the title of a grantee of the United States to swamp lands it appeals to the courts.

To this latter position there is this fatal objection, that a defendant cannot question the validity of a title from the Federal Government, when it is regular on its face, without first showing some claim, legal or equitable, in himself. (Doll vs. Meador, 16 California, 324, et sequitur; Mitchel vs. Parker, 25 Mo,, 34; Robbin vs. Eckles, 30 Mo., 506; Beard vs. Fedory, 3 Wallace, 486) Under this doctrine, before a State can defeat the title of a grantee from the United States to swamp lands, the State must show some claim, legal or equitable, in itself. But the State has no claim, legal or equitable, to the swamp lands, until the selection has been approved by the Secretary of the Interior, as was decided by the Supreme Court of Missouri in this very case. (P. 25 printed record.) It would seem to follow that neither the State of Missouri nor the defendants who claim under the section, can attack the title of plaintiff in this case, because the plaintiff's title is regular on its face, and because the land in suit has never been approved as swamp land by the Secretary of the Interior.

The Supreme Court of Missouri in their decision of this case, lay great stress on the act of August 3d, 1854, entitled "an act to vest in the several States and Territories the title in fee of the lands which have been, or may be certified to them," and which is as follows:

"That in all cases where lands have been or shall here-
"after be granted by any law of Congress to any one of the

"several States and Territories, and where said law does not "convey the fee simple title to said lands, or require patents "to be issued therefor, the lists of such lands which have "been or may hereafter be certified by the Commissioner of "the General Land Office, under the seal of said office, either "of originals or copies of originals on record, shall be re- "garded as conveying the fee simple of all the lands em- "braced in such lists that are of the character contemplated "by such acts of Congress, and intended to be granted by "such acts of Congress, but where lands embraced in such "lists are not of the character embraced by such acts of "Congress, and are not intended to be granted thereby, said "lists, so far as these lands are concerned, shall be perfectly "null and void, and no right, title, or claim, or interest shall "be conveyed thereby." (Lester's Land Laws, p. 236, No. 249.)

The Supreme Court of Missouri seem to think that under this statute the defendant, although he has no title, legal or equitable, to the land in suit, can defeat the plaintiff' title, which is regular on its face, by showing that this land is within the exception contained in the railroad grant of June 10th, 1852. It is submitted that this is a mistake, and is at direct variance with the law established by an almost unbroken current of decisions of the courts of the country. (16 Cal., 326; 3 Wallace, 486.)

The Supreme Court of Missouri says, "No doubt if the "Secretary of the Interior had included these lands in his "list and plats of swamp and overflowed lands, his action "would have been final and conclusive of that matter in the "courts, but his including them in the list of railroad lands "is not conclusive. It was left open by Congress to be de- "termined on judicial investigation."—(Page 26 of printed record.)

With all due respect, be it said, this position is utterly untenable. It is admitted that the act of 1854 does not make

the certified list of the Secretary conclusive evidence in all cases, but it does not, therefore, follow that is not conclusive in any case. That act certainly does not repeal the swamp act of 1850 in whole or in part. If, then, the decision of the Secretary as to what is swamp land and what is not, was conclusive under the act of 1850, before the act of 1854 was passed, it continued equally conclusive after the passage of the last mentioned act. It has been shown that under the act of 1850, the Secretary had the power and it was his duty to determine what lands came within the provisions of the act. If he decided a particular tract was swamp land, it passed to the State, and the United States were concluded. If he decided a particular tract was not swamp land, no title passed, and the State was concluded. Thus far the Supreme Court of Missouri fully agree with the plaintiff and hold that in all contests between the United States and the States, claiming title under the act of 1850, the decision of the Secretary is final and conclusive. In those cases he exercises a political power, and is beyond the control of the courts.—(Page 25 printed record.)

But, strange to say, that same court decided that when a mere wrong doer is a party to a suit, a mere intruder, one having neither title nor shadow of title, then the decision of the Secretary of the Interior is a nullity. It is impossible to find any ground for this distinction in the act of 1850, or in the act of 1854, or in any other act involved in this suit. The act of 1850 leaves the whole question as to what are and what are not swamp lands to the Secretary of the Interior. Under that act all lands are swamp lands which are decided to be so by the Secretary, and no lands are swamp lands unless the Secretary decides them to be so. Of course the presence of fraud or corruption would lead to a different result and would defeat the decision of that officer, as it would the decision of a court, if properly brought forward, alleged and proved.

In order to make this more plain, let reference be had to the case of a pre-emption. The railroad grant of June 10, 1852, expressly excepts from the grant all lands to which the right of pre-emption shall have attached before the lines of the railroads therein provided for shall have been definitely fixed.—(Lester's Land Laws, 183, sec. 2)

The general pre-emption law of 1841, gives the land officers the exclusive right of deciding pre-emption rights.—(Lester's Land Laws, 62, sec. 11 and 12.)

Let us now suppose that a person had settled upon a tract of land claimed by the Hannibal and St. Joseph Railroad Company under the act of 1852, and that the settler claimed a right of pre-emption. Let us suppose that the claim of the pre-emption right is submitted to the land officer under the law, and they decide against the right and certify the lands as railroad lands. This decision is final and conclusive that the settler had no right of pre-emption. Let us still further suppose that after the lists were certified to the railroad company, it should bring an action of ejectment against the settler, will it be seriously maintained that on the trial of the ejectment the defendant could introduce evidence of his pre-emption right, not for the purpose of establishing title in himself, but for the purpose of showing that the land was reserved, and that, therefore, the certified list under the act of 1854 passed no title. Is it possible that the decision of the land office is final and conclusive upon the right of pre-emption and no other tribunal has jurisdiction to try that question, and yet that the same right is to be contested before a jury as often as an action of ejectment is brought? That is the position of the Supreme Court of Missouri. They say, "The case has been argued apparently upon the theory "that this testimony was offered for the purpose of proving "a title vested in the defendant. For that purpose it cer- "tainly was not admissible, but for the purpose of rebutting "and invalidating this list, produced in evidence by the "plaintiff, we think it was admissible and competent."

It is difficult to understand the distinction asserted in the paragraph just quoted. It is difficult to perceive why it is that a party claiming title under the act of 1850 cannot appeal from the decision of the Secretary to a jury, and that a party who claims no title and is a wrong doer may so appeal. Certain it is no such distinction is to be found in the act itself. The Secretary decides what are swamp lands under that act, and his decision is final and conclusive in all cases, as to the character of the land, or it is final and conclusive in none.

Again, in adopting a basis upon which the swamp lands should be ascertained, the State authorities were requested to indicate a method of selection, which they would adopt in adjusting the grants.

Michigan and Wisconsin adopted the field notes of the surveys as the basis of the acceptance. (Lester's Land Law, 562.) It might very well happen that the field notes of the surveys would not correctly indicate all the swamp and wet land included under the act of 1850. Nevertheless, Michigan and Wisconsin were satisfied with the field notes, and the swamp lands have been adjusted on that basis to their satisfaction. They have no further claim to swamp lands. They have received all they called. Yet the Supreme Court of Missouri hold that if in either of these States the Secretary of the Interior has approved as railroad lands any lands that were in fact wet, and thereby unfit for cultivation on the 28th of September, 1850, a mere wrong doer, a mere intruder, can in a contest with the railroad company, show that fact to a jury, and defeat the title of the company. And this, although neither the United States nor the States claim the land, and both recognize the title of the railroad company. We insist that this is not the law, and that to hold it to be the law is to violate both the letter and the spirit of the act of Congress, as well as right and justice. The act of 1850 having given to the Secretary of the Interior the sole and

exclusive power of determining what are swamp lands and what are not, according to the act, in all controversies between the States and the United States, the only parties who can claim title under that act, his decision with regard to that subject must be final and conclusive in all cases.

WILLARD P. HALL,
With whom
SIDNEY BARTLETT, and
JAMES CARR.

SUPREME COURT

OF THE

UNITED STATES,

In Error of December Term, A. D. 1868.

THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, *Plaintiff in Error,*
vs.
LEWIS SMITH, *Defendant in Error.*

Error to the Supreme Court of Missouri.

STATEMENT OF THE CASE.

On the 30th day of March, A. D. 1863, the Plaintiff in error filed its petition in the Macon Circuit Court, in which it alleged that it is a corporation created under, and by virtue of an act of the General Assembly of Missouri, entitled, "An act to incorporate the Hannibal and St. Joseph Railroad Company," approved February 16th, 1847, and the several acts amendatory thereof. That on the 1st day of October, 1855, it was entitled to the possession of the N. W. qr. of the N. W. qr., and the E. ½ of the N. W. qr., and the N. E. qr. of the S. W. qr. of Section 20, in Township 58, and Range 16, situate in Macon County in the State of Missouri; and being so entitled to the possession thereof, that the defendant afterwards on the 2nd day of October, A. D. 1855, entered into said premises and

unlawfully withholds from the plaintiff the possession thereof, to the damage of the plaintiff in the sum of $; and praying judgment for the recovery of said premises.

The defendant in his answer simply denied that the plaintiff was entitled to the possession of said premises at the time alleged, or at any time since or prior thereto; and denied that he unlawfully withholds the possession thereof.

At the February term, 1866, the case was tried by the Court sitting as a jury.

The plaintiff, to show title in itself, read in evidence,

1st. The following act of Congress:

AN ACT granting the right of way to the State of Missouri, and a portion of the Public Lands, to aid in the construction of certain Railroads in said State.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

§ 1. That the right of way through the public lands be, and the same is hereby granted to the State of Missouri, for the construction of railroads from the town of Hannibal to the town of St. Joseph, in said State, and from the city of St. Louis to such point on the western boundary of said State as may be designated by the authority of said State, with the right also to take necessary materials of earth, stone, and timber, for the construction thereof, from the public lands of the United States adjacent to said railroads; *Provided*, That in locating the railroads aforesaid, and assigning the limits to the easement, no more land shall be taken from the United States than is necessary for a convenient construction and use of said roads as public ways for transportation, including Stations, with the usual buildings of all kinds, turnouts and such other appurtenances as are usually enjoyed by railroad companies; and a *copy of the location* of said roads, made under the direction of the Legislature, shall be forwarded to the proper local land offices respectively, and to the *General Land Office* at Washington City, within ninety days after the completion of the same, to be recorded.

§ 2. *And be it further enacted*, That there be, and *is hereby granted* to the State of Missouri, for the purpose of aiding in making the railroads aforesaid, every alternate section of land designated by even numbers, for six sections in width on each side of said road; but in case it shall appear that the United States have, when the line or route of said roads or either of them shall be definitely fixed by the authority aforesaid, sold any section or any part thereof granted as aforesaid, or that

the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the Governor of said State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States most contiguous to the tier of sections above specified, so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold, or to which the right of pre-emption has attached as aforesaid; which lands, thus selected in lieu of those sold, and to which pre-emption rights have attached as aforesaid, together with the sections and parts of sections designated by even numbers as aforesaid, and appropriated as aforesaid, shall be held by the State of Missouri for the use and purpose aforesaid; *Provided*, That the lands to be so located shall in no case be further than fifteen miles from the line of the road in each case: *Provided further*; That the lands hereby granted shall be exclusively applied in the construction of that road for which it was granted and selected, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever; *And provided further*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be and the same are hereby reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the route of the said railroads through such reserved lands, in which case the right of way only shall be granted.

§ 3. *And be it further enacted*, That the sections and parts of sections of land which, by such grant, shall remain to the United States, within six miles on each side of said roads, shall not be sold for less than double the minimum price of the public lands when sold; which lands shall from time to time be offered at public sale to the highest bidder, under the direction of the Secretary of the Interior, and shall not be subject to entry until they shall have been so offered at public sale.

§ 4. *And be it further enacted*, That the said lands hereby granted to the said State shall be subject to the disposal of the Legislature thereof, for the purposes aforesaid, and no other; and the said railroads shall be and remain public highways for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States.

§ 5. *And be it further enacted*, That the lands hereby granted to said State shall be disposed of by said State only in manner following, that is to say: that a quantity of land not exceeding one hundred and twenty sections on each road, and included within a continuous length of twenty miles of said road, may be sold; and when the Governor of said State shall certify to the Secretary of the Interior, that said twenty miles of said road is completed, then another like quantity of land hereby granted may be sold; and so from time to time, until said road is completed; and if said road be not completed within ten years, no further sales shall be made, and the land unsold shall revert to the United States.

§ 6. *And be it further enacted*, That the United States mail shall at all times be transported on said railroads under the direction of the Post Office Department, at such price as Congress may by law direct.

Approved June 10, 1852.

2nd. The following act of the General Assembly of the State of Missouri:

AN ACT to accept a grant of land made to the State of Missouri by the Congress of the United States, to aid in the construction of certain Railroads in this State, and to apply a portion thereof to the Hannibal and St. Joseph Railroad.

Be it enacted by the General Assembly of the State of Missouri, as follows:

§ 1. That all that portion of the lands granted to this State by the act of Congress, entitled "An act granting the right of way to the State of Missouri, and a portion of the public lands, to aid in the construction of certain Railroads in said State," approved June 10th, 1852, so far as the same are applicable to the construction of a railroad from the town of Hannibal to the town of St. Joseph in this State, and which may be selected or located in conformity with its provisions, together with all the rights and privileges thereto belonging, or in said act granted, shall vest in full and complete title, in the Hannibal and St. Joseph Railroad Company, for the uses and purposes, and subject to the conditions, reversion and provisions set forth and contained in said act of Congress.

§ 2. The selection of lands provided for in the act of Congress aforesaid, shall be made by said company, or such agent or agents as it may designate, under the appointment of the Governor, subject to the approval in said act specified; and a copy of the location of said road shall be made and certified by the President and Chief Engineer of said company, under the

corporate seal of said company, and forwarded to the local land offices and the general land office as in said act required: said selection of lands, as well as the surveys, location and copy of the location of said road, shall be at the cost and charge of the said company, without charge of any kind upon the treasury of this State.

§ 3. In consideration of the grants and privileges herein conferred upon said company, the said company shall, on the first Monday in December of each year, after said road is completed, opened and in operation, and declares a dividend, pay into the treasury of the State a sum of money equal to the amount of the State tax on other real and personal property of like value, for that year, upon the actual value of the road bed, buildings, machinery, engines, cars and other property of said company, which shall be as a consideration to the State for the execution of the trust reposed in the State, by an act of Congress of the United States, approved June 10th, 1852, entitled "An act granting the right of way to the State of Missouri, and a portion of the Public Lands, to aid in the construction of certain Railroads in said State;" and for the purpose of ascertaining the value of the same, it shall be the duty of the President of said company, on the first day of February in each year, after said road is completed, opened and put in operation, and declares a dividend, to furnish to the Auditor of the State a statement under his oath, made before and certified by some officer authorized to administer oaths, the actual value of the road bed, buildings, machinery, engines, cars and other property of said company, and from said statement so furnished, the Auditor shall charge said company with the amount appearing to be due the State, according to the statement furnished, as herein required, by the President of said company; and in case said company shall fail to pay into the State Treasury within thirty days after the first day of December in each year, the amount charged against said company as aforesaid, said company shall forfeit and pay to the State of Missouri, in addition to the sum with which said company stands charged by the Auditor, ten per cent. per month on the amount charged to said company, which sum charged against said company, together with the ten per cent. per month hereinbefore specified, may be recovered in the name of the State of Missouri, by civil action, in any court of competent jurisdiction. And should the President of said company fail to make out and furnish to the Auditor of the State, a statement as

herein required, said company shall forfeit and pay to the State ten thousand dollars for each failure, which may be recovered in the name of the State of Missouri, in any court of competent jurisdiction: *Provided*, That if said company shall fail for the period of two years after said road shall be completed and put in operation, to declare a dividend, that then said company shall no longer be exempt from the payment of said sum of money in this section required to be paid into the State Treasury, on the first Monday in December of each year, by said company, nor from the forfeitures and penalties in this section imposed.

§ 4. That this act and all grants herein contained, shall cease and be void, unless accepted by said company, within six months after the passage of this act; said acceptance to be executed by said company under their corporate seal, and filed in the office of the Secretary of State.

§ 5. That each and every person who, on the tenth day of June, one thousand eight hundred and fifty-two, was the owner of any improvements made prior to that date, on any land embraced in the grant aforesaid, and who became such owner, with a view to a residence on, or occupation of, such land, for agricultural purposes, shall have the right of purchase at not exceeding two dollars and fifty cents per acre, subject to the reversion in said act provided for, a quantity of the land so occupied, to be bounded by the legal subdivisions, not exceeding one quarter section, to consist of quarter quarter, half quarter, or quarter section, which will include the improvement aforesaid: *Provided*, That any person claiming the right to purchase under the provisions of this act shall, within four months from the date of the location of the lands, file in the Clerk's office of the Circuit Court of the county in which the land claimed is situated, a notice to the said corporation of his, her or their claims, describing the land by its numbers, accompanied with an affidavit stating the date and object of the improvement, the time and manner, when and how he, she or they became the owner thereof, and also the affidavits of at least two residents of the county proving the facts in relation to such claim; *And provided further*, That the right of way upon and across any lot sold under the provisions of this section, not exceeding two hundred feet in width, shall be reserved and retained for the passage of the road, as the same may be located and constructed, but no sale or conveyance of any lot of land under the provisions of this section, shall affect the right

or equities of two or more parties claiming the same, as between each other.

§ 6. In case any of the lands located or selected under the act of Congress aforesaid shall remain unsold at the expiration of ten years after the completion of the said road, the same shall be offered at public sale annually, until the whole is disposed of, except such lots as may be deemed to be necessary by said company for practical purposes in sustaining and operating their said road.

§ 7. The said company shall, within one year after their road shall have been located, cause to be made a map or profile thereof, and a map of the land taken and obtained for the use of such road, and file the same in the office of the Secretary of State, and also maps of the parts thereof located in the different counties through which the said road may pass, and cause the same to be recorded in the office for recording deeds, in the county in which said parts of said road shall lie.

§ 8. That for the purpose of raising funds, from time to time, for the construction and completion of said road, and the purchase of iron and other materials to be used thereon, said company may issue their bonds, in sums of not less than five hundred, nor more than one thousand dollars each, at rates of interest not higher than seven per cent. per annum, payable semi-annually, and the principal of said bonds payable at the pleasure of said company, at such place as it may designate. The payment of said bonds may be secured by the mortgage of said lands, to be executed by said company, subject to the reversion in the said act of Congress provided for; *Provided*, That the faith of the State is in no manner pledged for the redemption of said bonds, or any part thereof; *And provided further*, That nothing in this act contained shall be construed to authorize said company to sell, dispose of or apply the said lands or the proceeds thereof, in any other manner, or to any other purpose, than as required and limited by the said act of Congress.

This act to take effect from its passage.

Approved September 20th, 1852.

3d. A copy of the resolution of the Board of Directors of the Hannibal and St. Joseph Railroad Company, adopted at a meeting held on the 7th day of March, 1853, accepting the grant of land made to the State of Missouri, by the Congress of the United States, to aid in the construction of certain railroads in said State, and to apply a portion thereof to the

Hannibal and St. Joseph Railroad, as prescribed by the 4th section of the act of September 20th, 1852, and filed in the office of the Secretary of State on the 17th day of March, 1853, duly certified by the Secretary of State.

4th. An exemplified copy of the map of the definite location and route of the Hannibal and St. Joseph Railroad from the city of Hannibal to the city of St. Joseph, Missouri, with a line on the same denoting the line of said railroad, with lines and figures on the same denoting the sections, townships and ranges. On which exemplified copy of said map are the following certificates, words and figures:

Received with letter of R. M. Stewart, of June 10th, 1853, No. 5181, handed in same day.

We, the undersigned, Robert M. Stewart, President, and James M. Bucklin, Chief Engineer of the Hannibal and St. Joseph Railroad Company, do hereby certify, that the map to which this certificate is attached, and the line of route of the Hannibal and St. Joseph Railroad, as marked and laid down thereon, is a true copy of the definite location of said road, as made and adopted by said Company at a meeting of the board of directors thereof, at Glasgow, Mo., on the 8th day of March, 1853.

R. M. STEWART,
President H. & St. Jo. R. R.
JAMES M. BUCKLIN,
Chief Engineer H. & St. Jo. R. R.

HANNIBAL & ST. JOSEPH RAILROAD,
Secretary's Office.

I, Robert F. Lakenan, Assistant Secretary of the Hannibal and St. Joseph Railroad Company, do hereby certify, that Robert M. Stewart was President, and James M. Bucklin was Chief Engineer of the Hannibal and St. Joseph Railroad Company at the date of the execution of the above certificate.

Given under my hand and the seal of said Company, this 30th day of June, 1853.

SEAL.

R. F. LAKENAN,
Assistant Secretary H. & St. Jo. R. R.

GENERAL LAND OFFICE,
September 19, 1860.

I, Joseph S. Wilson, Commissioner of the General Land Office, do hereby certify that the annexed transcript map and

certificate, except the red shaded lines thereon, is a true and literal exemplification of the map on the files in this office.

In testimony whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, the day and year above written.

SEAL.

Jos. S. WILSON,
Commissioner of the General Land Office.

5th. J. M. Willis testified that the Hannibal and St. Joseph Railroad was completed in the latter part of February, 1859; and that the land in controversy lies between three and four miles from said railroad.

6th. A list of lands certified to the Hannibal and St. Joseph Railroad Company by the Commissioner of the General Land Office, to which is prefixed the following caption:

"HANNIBAL AND ST. JOSEPH RAILROAD."

"A list of vacant lands situate in the Palmyra, Milan and Plattsburgh Districts, State of Missouri, in the sections bearing even numbers, accruing to said State in virtue of the grant made by the act of Congress, approved 10th of June, 1852, as more particularly set forth in the general certificate hereto appended, to wit: The N. W. qr. of the N. W. qr., and the E ½ of the N. W. qr., and the N. E. qr. of the S. W. qr., all in section 20, township 58, range 16."

GENERAL LAND OFFICE,
November 18th, 1854.

I certify that the foregoing is a list of lands situate in the districts of land subject to sale at Palmyra, Milan and Plattsburgh, in the State of Missouri, remaining unsold and undisposed of in the alternate sections designated by even numbers for six sections in width on each side of the railroad from the town of Hannibal to the town of St. Joseph, the location of which said railroad has been filed in this office, in pursuance of an act, granting the right of way to the State of Missouri, and a portion of the public lands to aid in the construction of certain railroads in said State, approved June 10th, 1852; and I further certify that said parts of sections are granted to the said State of Missouri pursuant to the authority in said act, and respectfully recommend that said lands be approved to the said State of Missouri, subject to any valid interfering right.

JOHN WILSON, Commissioner.

DEPARTMENT OF THE INTERIOR,
Nov. 18th, 1854.

Approved, subject to any valid interfering right.

R. McCLELLAND, Secretary.

Appended to the above list of lands certified as aforesaid, is the following additional certificate in the books containing said lists:

GENERAL LAND OFFICE,
May 19th, 1856.

I, Thomas A. Hendricks, Commissioner of the General Land Office, do hereby certify that the foregoing, on pages one to sixty-five, inclusive, is a true and correct list of the tracts of land within the six mile limit granted to the State of Missouri by the act of Congress, entitled, "An act granting the right of way to the State of Missouri, and a portion of the public lands to aid in the construction of certain railroads in said State," approved June 10th, 1852, being the vacant and unappropriated lands in the alternate sections designated by even numbers, for six sections in width, on each side of the railroad from the town of Hannibal to the town of St. Joseph, in said State, which were submitted by the General Land Office for the approval of the Secretary of the Interior, and by him approved, as by the certificate thereto fully appears, and they are now certified to said State in this manner, in conformity with the provisions of the act entitled, "An act to vest in the several States and Territories the title in fee simple of the lands which have been or may be certified to them," approved Aug. 3d, 1854.

In testimony whereof, I have hereto signed my name, and caused the seal of the General Land Office to be affixed, in the City of Washington, the day and year first herein written.

SEAL.

THOS. A. HENDRICKS, Commissioner.

GENERAL LAND OFFICE,
November 23d, 1859.

I, Samuel A. Smith, Commissioner of the General Land Office, do hereby certify that the annexed list and certificate is a true exemplification of the original on file in this office.

In testimony whereof, I have hereto subscribed my name and caused the seal of this office to be affixed, at the City of Washington, on the day and year above written.

SEAL.

S. A. SMITH,
Commissioner of the General Land Office.

The plaintiff here rested.

1st. The defendant to show title in himself, read in evidence the following act of Congress:

AN ACT to enable the State of Arkansas and other States, to reclaim the swamp lands within their limits.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State.

Sec. 2. *And be it further enacted*, That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and, at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof: *Provided, however*, That the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

Sec. 3. *And be it further enacted*, That in making out a list and plats of the land aforesaid, all legal subdivisions, the greater part of which is "wet and unfit for cultivation," shall be included in said list and plats; but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

Sec. 4. *And be it further enacted*, That the provisions of this act be extended to, and their benefits be conferred upon, each of the other States of the Union in which such swamp and overflowed lands, known and designated as aforesaid, may be situated.

Approved, September 28, 1850.

2nd. The 1st, 2nd, 3d and 4th sections of an act of the General Assembly of the State of Missouri, entitled "An act donating certain swamp and overflowed lands to the counties in which they lie," as follows:

§ 1. That in order to provide for the reclamation of all

overflowed and swamp lands which were granted to the State of Missouri, for that purpose, by an act of the last session of the Congress of the United States, entitled "An act to enable the State of Arkansas, and other States, to reclaim the swamp lands within their limits," approved September 28th, 1850, all said lands in this State are hereby donated to the counties in which said lands respectively may be situated, except so much of said lands as are situated in the counties of Scott, New Madrid, Pemiscot, Mississippi, Cape Girardeau, Stoddard, Dunklin, Ripley, Butler and Wayne, for the purposes hereinafter designated, unless otherwise disposed of by law at the present session.

§ 2. So soon as the several county courts shall be furnished with the proper description of the lands, contemplated in the first section of this act, they are hereby authorized and required, so soon as practicable, to have said overflowed and swamp lands drained and reclaimed, so as to render them tillable, or otherwise subservient to the purposes of this act, and for that purpose may appoint one or more commissioners who shall, under the direction of said court, superintend the draining, reclaiming and surveying of said lands.

§ 3. Whenever, in the judgment of said county courts, it shall be the interest of said counties so to do, they shall order the sheriff to sell the same in such quantities, at such times and places, and on such terms as they may think proper; *Provided*, That all sales made under the provisions of this act, shall conform to the subdivisions prescribed by the laws of the United States.

§ 4 Whenever full payment shall be made for any of said lands by the purchaser thereof, the county courts shall cause the same to be certified to the governor, who shall thereupon grant to the purchaser, his heirs or assigns, a patent for the same, which patent shall be signed by the governor, countersigned by the secretary of state, and be recorded in the office of the secretary of state.

Approved, March 3, 1851.

These sections were carried into the revised statutes of 1855, page 1005, a few unimportant words being omitted therein.

3d. A certificate of purchase of the land in controversy, from the sheriff of Macon county, Mo., to Isaac Millsaps, dated October 3d, 1855, and an assignment of said certificate by said Millsaps to the defendant, dated April 13th, 1857.

4th. An order of the county court of Macon county, Mo.,

made on the 4th day of May, 1852, appointing Joseph D. Butler commissioner to select the swamp and overflowed lands in said county, according to the act or acts of the legislature donating the same.

5th. The defendant next read in evidence the following report of said Butler to the county court of Macon county, of the swamp and overflowed lands, filed on the 7th day of February, 1853, to wit:

To the honorable the county court of Macon county:

The undersigned, commissioner, would respectfully submit this as his report of lands selected as swamp lands within Macon county. Among others, the following lands, to wit: the N. W. N. W., and E. ½ N. W., and N. E. S. W. qr., all in section 20, T. 58, range 16.

Opposite said land in said report is the following memorandum:

"All the lands situated in townships 58 and 59 have been selected by running a line on the east side, and a line on the west side of the Chariton river, on which stream they are situated, including all lands along said stream that are subject to overflow and inundation during the seeding, growing and harvesting seasons, and has frequent standing lakes and ponds, and the Chariton meanders through, and is unfit for cultivation without embankment or artificial draining."

All of which is respectfully submitted.

Filed Feb. 7th, 1853. J. D. BUTLER, Com.

And an order of said county court, that said report be received.

6th. An order of said county court, made on the 5th day of September, 1855, requiring the sheriff to offer the lands selected as swamp and overflowed, for sale to the highest bidder, on the 1st Monday in November, 1855, except those upon which actual settlement or cultivation existed on the 1st day of September, 1855. (The defendant's assignor, coming within the exception, was allowed to purchase at private sale, by complying with the terms of said order.)

The defendant then offered to prove by the testimony of witnesses, that said land was swamp and overflowed, and for that purpose John Souther was introduced and sworn, to whom the following question was propounded:

"What was the character of the land in 1850 and prior to that time? Was it susceptible of cultivation? Was it swamp or swampy and subject to overflow?"

The attorney for plaintiff objected to the witness answering this question, for the following reasons:

1st. "Because the defendant is not entitled to prove by the testimony of witnesses the character of the land, whether it was susceptible of cultivation in 1850, and prior to that time, or not; or whether it was swamp and swampy, and subject to overflow.

2nd. "Because the defendant can only invalidate the title shown by the plaintiff's evidence, by written or documentary evidence, showing a grant prior in point of time to the grant under which plaintiff claims title, and a full compliance with the terms of such grant, or a patent issued prior in date to the vesting of the title in the plaintiff.

3d. "Because the defendant can only invalidate the plaintiff's title on two grounds: first, want of authority in the officers of the United States government certifying said land to plaintiff; or second, fraud on the part of the plaintiff in obtaing said title, and the defendant does not offer to invalidate it on either of said grounds.

4th. "Because the defendant can only show a paramount title to said land, by showing that it has been selected as swamp or overflowed land by the State, or the county under the State, reported to the Commissioner of the General Land Office, approved by him, and a patent issued therefor to the State, prior to the vesting of the title to the same in the plaintiff.

5th. "Because the testimony offered is irrelevant, illegal and cannot show title to said land in this way."

Which objection the court overruled and allowed the witness to answer said question. To which ruling of the court the plaintiff at the time excepted.

The plaintiff objected to the introduction of any and all testimony in regard to the character of the land in controversy, as to whether it was swamp or overflowed land in 1850, and prior and subsequent thereto, for the same reasons already stated for objecting to the question propounded to said witness, by the defendant; which objection was overruled, and the witness allowed to testify in regard to the character of said land, whether it was swamp or overflowed or not. To which ruling of the court the plaintiff at the time excepted.

The testimony tended to show that the land in controversy lies from two-thirds to a mile on the west side of Chariton river, that a *wet weather creek* whose banks were higher than the adjacent land, heading in the bluffs about four miles north of

said land, runs through it, that it overflows contiguous lands during great and sudden rains, that it falls almost as rapidly as it rises, running down in three or four hours after it ceases raining, that in dry weather it ceases to flow, that the water from the Chariton only overflowed about one-fourth of the land when there was a great flood, which appears to have occurred every few years, that 18 or 20 acres of this land had been in cultivation since 1854, producing good crops of corn and tobacco, that defendant built a dwelling house upon it, which two scientific practical engineers after careful surveys and levelings, pronounced to be 12 feet above the highest rise ever known in the Chariton by the oldest inhabitant. One of whom, Mr. F. R. Lockling, had had considerable experience in surveying swamp and overflowed lands in the State of Arkansas, and who gave it as his opinion, that the land in controversy was neither swamp nor overflowed land. "*The land selected there*, i. e. *in Arkansas, as swamp lands, were of a different character from the land in controversy. They were marshy and water stood on them the year round, and it was necessary, in order to cultivate them, to resort to levees and drainage.*"

That the greater portion of each legal subdivision was capable of cultivation, that said land had never been reclaimed by artificial means, such as drainage or levees, that the land has sufficient fall to carry the water off rapidly, that it does not stand upon it, nor was any of it wet except a small portion on the S. W. corner of the N. E. qr. of the N. W. qr., during the wet season, *that prior to 1850, the land had been wetter, more rain fell, more land was inundated, Chariton river and Panther Creek rose higher and spread wider than since that period.*"

The plaintiff asked the court to make the following declarations of law:

1st. Under the act of Congress entitled, "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," approved September 28, 1850, the title to the land in controversy could not be divested out of the United States until an accurate list and plat of said lands had been made out by the Secretary of the Interior, and the same transmitted to the Governor of this State, and at the request of said Governor said Secretary had caused a patent to be issued to the State therefor, in pursuance of the second section of the act aforesaid.

2nd. If the court believes from the evidence that the said land is a part of the lands granted to the State of Missouri by

the act of Congress entitled, "An act granting the right of way to the State of Missouri, and a portion of the public lands to aid in the construction of certain railroads in said State," approved June 10th, 1852, and by the act of the legislature of the State of Missouri, to the Hannibal and St. Joseph Railroad Company, entitled, "An act to accept a grant of land made to the State of Missouri by an act of the Congress of the United States, to aid in the construction of certain railroads in this State, and to apply a portion thereof to the Hannibal and St. Joseph Railroad," approved September 20th, 1852, and that the plaintiff accepted said act and all grants therein contained by a resolution of its board of directors, on the 7th day of March, 1853, and that a copy of said resolution was filed in the office of the Secretary of State as prescribed by the fourth section of the last mentioned act, and that a copy of the location of the plaintiff's railroad was made and certified by plaintiff's president and chief engineer, under the corporate seal of the plaintiff and forwarded and filed in the office of the commissioner of the general land office on the 10th day of June, 1853, as prescribed by the first section of the act of Congress, and the second section of the act of the Missouri legislature aforesaid, and that said land is within six miles of the plaintiff's railroad as located, and that said railroad was completed in 1859, and if the court further believe from the evidence that said several acts mentioned in this instruction had been done prior to the issuing of a patent to the State of Missouri, for said lands as laid down in the first instruction, then the title to said land is vested in the plaintiff and the court will find for the plaintiff.

3d. Under the act of Congress entitled, "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," approved September 28th, 1850, the title to said land could not be divested out of the United States until evidence had been filed with the commissioner of the general land office, showing it to be swamp or overflowed land, within the purview of said act, and a patent issued therefor, or after the filing of said evidence, until the passage of the act of Congress of the 3d of March, 1857, confirming the title thereto in the State, without any patent; and if the court believe from the evidence that the plaintiff had complied with and performed the several acts on its part specified in the act of Congress entitled, "An act granting the right of way to the State of Missouri, and a portion of the public lands to aid in

the construction of certain railroads in said State," approved June 10th, 1852, and of the act of the Legislature of the State of Missouri entitled, "An act to accept a grant of land made to the State of Missouri by the Congress of the United States to aid in the construction of certain railroads in this State, and apply a portion thereof to the Hannibal and St. Joseph railroad," approved September 20th, 1852, and said land lies within six miles of the plaintiff's railroad, as located, and said railroad was located prior to the institution of this suit, and prior to the issuing of said patent or filing the evidence in the office of the commissioner of the general land office, as aforesaid, and prior to the passage of said act of Congress confirming the title to said land to the State, then the title thereto vested in the plaintiff, and the court will so find.

4th. If the court believe from the evidence that said land is a part of the land granted to the State of Missouri by the act of Congress as aforesaid, approved June 10th, 1852, and by the act of the legislature of the State of Missouri, as aforesaid, approved September 20th, 1852, and that said land lies within six miles of plaintiff's railroad, as located, and said railroad was completed prior to the institution of this suit, then the court will find for plaintiff.

5th. To constitute land overflowed within the purview of the law, the same must be overflowed during the planting, cultivating and growing season, in each year, so as to be made unfit thereby for cultivation without constructing levees and drains to reclaim the same.

6th. To constitute land swamp within the purview of the law, the same must be so wet and marshy during the planting, cultivating and growing season, in each year, as to be made unfit thereby for cultivation without constructing levees and drains to reclaim the same.

7th. To constitute land overflowed within the purview of the law, the same must be so overflowed during the planting, cultivating and growing season during a majority of years, as to be made unfit thereby for cultivation without constructing levees and drains to reclaim the same.

8th. To constitute land swamp within the purview of the law, the same must be so wet and marshy during the planting, growing and cultivating season in a majority of years, as to be made unfit thereby for cultivation without constructing levees and drains to reclaim the same.

9th. If the court believe from the evidence that said land is neither swamp nor overflowed land, as defined in instructions numbered 5 and 6, it will find for plaintiff.

10th. If the court believe from the evidence that said land is neither swamp nor overflowed, as defined in instructions numbered 7 and 8, it will find for the plaintiff.

The court gave those numbered 4, 7, 8 and 10, but the remainder of said declarations it refused to make. To which refusal to make said declarations of law the plaintiff at the time excepted.

The defendant then asked the court to make the following declarations of law:

1st. That if the lands sued for were on the 28th day of September, 1850, swamp or overflowed lands, and thereby rendered unfit for cultivation, then the act of Congress of that date was a present absolute grant thereof to the State of Missouri, and were by the act of the legislature of 1851 conveyed to Macon county, and the plaintiff has no title thereto.

2d. That the State of Missouri having conveyed to Macon county the swamp lands therein, and having conveyed subsequently to the Hannibal and St. Joseph Railroad Company lands granted by Congress to the State for railroad purposes, that even though the act of Congress granting swamp lands to the State of Missouri was a conditional grant, yet the absolute grant of said lands by the State to the counties is a qualification and limitation of the grant to the railroad company from Missouri, was made subject to the previous grant by Missouri of the swamp lands.

3rd. That the act of Congress granting railroad lands was made subject to the act granting swamp lands to the State, and swamp lands were not included in the grant of lands for railroad purposes.

Which the court made.

To the making of which the appellant at the time accepted.

The court found and rendered judgment for the respondent.

The appellant then filed a motion for a new trial, assigning the following reasons:

1st. Because the court found without evidence.

2d. Because the court found against evidence.

3rd. Because the court admitted illegal testimony on the part of the defendant.

4th. Because the court refused to admit legal testimony on the part of the plaintiff.

5th. Because the court refused to make legal and proper declarations of law asked by the plaintiff.

6th. Because the court made illegal and improper declarations of law asked by defendant.

7th. Because the court found and rendered judgment for the defendant, when it should have found and rendered judgment for the plaintiff.

Which motion the court overruled. To the overruling of which the plaintiff at the time excepted, tendered its bill of exceptions and took this case to the Supreme Court of Missouri by appeal.

At the August Term, 1867, of the Supreme Court of the State of Missouri, the judgment of the Circuit Court of Macon county was affirmed. Thereupon, the plaintiff in error brought this case to this court by writ of error.

Upon this record the pl'tff in error assigns the following errors:

1. That the circuit court of Macon connty, in the State of Missouri, on the trial of said cause, admitted improper and illegal testimony on behalf of the defendant in error.

2. That said court rejected proper and legal testimony offered by the plaintiff in error.

3. That said court made improper and illegal declarations of law on the part of the defendant in error.

4. That said court refused to make proper and legal declarations of law offered by the plaintiff in error.

5. That said court found against the evidence.

6. That said finding was against the law.

7. That said finding was against both law and evidence, and against the law under the evidence.

8. That said finding was against the weight of evidence.

9. That said court overruled the motion for a new trial made by the plaintiff in error.

10. That by the record aforesaid it appears that the judgment aforesaid given was given for the defendant in error against the plaintiff in error; whereas, by the law of the land the said judgment ought to have been given for the plaintiff in error against the defendant in error; and the said Hannibal and St. Joseph Railroad Company, plaintiff in error, as aforesaid, prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that it may be restored to all things which it hath lost by occasion of the said judgment.

BRIEF.

On this record the plaintiff in error makes the following points:

I. The title to the public lands is vested in the United States. (Johnson vs. M'Intosh, 8 Wheat., 543; Mitchel *et al.* vs. The United States, 9 Pet., 745; Irvine vs. Marshall, *et al.* 20 How., 558.)

II. The Constitution of the United States confers upon Congress "power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States." (§ 3, Article IV; Bagnell, *et al.* vs. Broderick, 13 Pet., 436; Wilcox vs. Jackson. *id.*, 498; Jourdan *et al.* vs. Barrett *et al.* 4 How., p. 185; West vs. Cochran, 17 *id.* p. 414; Pollard's Lessee vs. Hagan *et al.* 3 How., p. 224.)

III. The title to the public lands can only be divested out of the United States in three ways, viz: 1st. By grant; 2nd. By confirmation; 3rd. By patent issued in pursuance of some act of Congress.

1st. By *grant* contained in some act of Congress, as by the 6th section of the act of Congress of the 6th of March, 1820, providing for the admission of Missouri into the Union, whereby the sixteenth section of land in every township was "*granted* to the State for the use of the inhabitants of such township for the use of schools;" "all salt springs, not exceeding twelve in number, with six sections of land be, and the same are hereby *granted* to said State;" "four entire sections of land, be and the same are hereby *granted* to the said State, for the purpose of fixing their seat of government thereon;" "thirty-six sections or one entire township, which shall be designated by the President of the United States, together with the other lands heretofore reserved for that purpose, shall be reserved for the use of a seminary of learning, and vested in the legislature of

said State, to be appropriated solely for the use of such seminary by the legislature." (Vol. 3, U. S. Stat. at Large, p. 547; Lessieur vs. Price, 12 How., p. 60; S. C. 12 Mo. Rep., p. 14; Strother vs. Lucas, 12 Pet., 454; 6 Cranch, 128; Wilcox vs. Jackson, 13 Pet., 516; Jackson vs. Hart, 12 John., 81.)

2nd. By *confirmation*, which is defined by Lord Coke to be "a conveyance of an estate or right in *esse*, whereby a *voidable* estate is made sure and *unavoidable;* or where a particular estate is increased;" "a contract by which that which was *voidable* is made sure and unavoidable. (Bouvier Dic., Tit., Confirmation.)

Numerous acts of confirmation may be found in the U. S. Statutes at Large. See particularly the act of Congress of July the 4th, 1836, confirming certain Spanish claims therein mentioned. (Vol. 5, p. 126.) Acts of confirmation are applied to inchoate or equitable titles. If the title were perfect, there would be no necessity for an act of Congress confirming it. The very word imports, *ex vi termini*, that the title or right in the land is *voidable*, and hence the necessity of an act of Congress to *confirm* it—to make it "sure and unavoidable."

IV. The act of Congress entitled, "An act granting the right of way to the State of Missouri, and a portion of the public lands to aid in the construction of certain railroads in said State," approved June the 10th, 1852, (10th vol. U. S. Stat. at Large, page 8,) containing words of *present grant*, passed the title in fee, *proprio vigore*, to "every alternate section of land designated by *even* numbers, for six sections in width on each side" of the Hannibal and St. Joseph railroad, "to the State of Missouri, for the purpose of aiding in making said" railroad, unless the same had been previously sold, or the right of pre-emption had attached thereto.

Now let us ascertain if said act does contain words of *present grant*. In the second section are these words: "That there BE AND IS HEREBY GRANTED to the State of Missouri, for the purpose of aiding in making the railroads aforesaid, every alternate section of land designated by even numbers, for six sections in width on each side of said road." Then follows the privilege of selecting other lands in lieu of those that would otherwise have been embraced in the grant, if they had not been previously sold by the United States, or to which the right of pre-emption had attached. This clause of the section is in these words: "But in case it shall appear that the United

States have, when the line or route of said road shall be definitely fixed by the authority aforesaid, sold any section or any part thereof GRANTED AS AFORESAID, or that the right of preemption has attached to the same, then it shall be lawful for any agent or agents appointed by the Governor of said State, to select, subject to the approval of the Secretary of the Interior, from the lands of the United States most contiguous to the tier of sections above specified, so much land, in alternate sections or parts of sections, as shall be equal to such lands as the United States have sold, or to which the right of preemption has attached as aforesaid;" "*Provided*, That the lands to be so located shall in no case be further than fifteen miles from the line of the road in each case." (The act likewise granted lands to aid in the construction of the Pacific railroad of Missouri.) Again in the same section these words are used: "THAT THE LANDS HEREBY GRANTED shall be exclusively applied in the construction of that road for which it WAS GRANTED and selected," not such as should thereafter be granted or selected, but such as were thereby granted. After the line or route of the road was definitely fixed, such location at once gave precision to the grant and *eo instanti* the title to "every alternate section of land designated by *even* numbers, for six sections in width on each side of said road," vested in "the State of Missouri, for the purpose of aiding in making said railroads." After the making of the definite location of the line or route of said railroad there was no contingency upon which the vesting of the title to said lands depended. The title became fixed and absolute, as much so as the title to the sixteenth section in every township became fixed and vested as soon as the public lands were surveyed. *Id certum est, quod certum reddi postest.* No more remained to be done. As soon as the definite location was filed in the general land office, it had all the information necessary to ascertain what *lands* were embraced in the grant. The only condition annexed was a condition subsequent, viz: "If said road be not completed within ten years, no further *sale* shall be made, and the land unsold shall revert to the United States." The road was completed long before the ten years had expired. Hence this condition has been performed.

Again in the fourth section the following words are used: "That the said lands HEREBY GRANTED to the said State, shall be subject to the disposal of the legislature for the purposes

aforesaid and no other." And in the fifth section are the following words: "That the lands HEREBY GRANTED to said State shall be disposed of by said State only in manner following." Then follows a limitation on the power of disposal until a definite portion of said road should be completed. But these words do not convert the foregoing words of *present grant* into a conditional or contingent grant, which might be performed or happen, or not. The words last quoted merely qualify the power of disposal vested in the grantee.

The following words in the sixth section of the act of Congress of March the 6th, 1820, [vol. 3, U. S. Stat. at Large, p. 547,] donating four sections of land to the State of Missouri, have been held by the Supreme Court of Missouri, in the case of Lessieur vs. Price, (12 Mo.,) and again by the Supreme Court of the United States, (12 How.,) to be words of *present grant*, and to divest the fee out of the United States and vest it in the State, viz: "Four entire sections of land be, and the same are hereby granted to said State, (the State of Missouri,) for the purpose of fixing their seat of government thereon." Justice Catron uses the following language in construing said section:

"The land was granted by the act of 1820; it was a *present grant*, wanting identity to make it perfect; and the legislature was vested with full power to select and locate the land; and we need only here say, what was substantially said by this court in the case of Rutherford vs. Green's heirs, (2 Wheat., 196,) that the act of 1820 vested a title in the State of Missouri, of four sections; and that the selection made by the State legislature pursuant to the act of Congress, and the notice given of such location to the surveyor-general, and the register of the land district where the land lay, *gave precision to the title, and attached to it the land selected.* The United States assented to this mode of proceeding; nor can an individual call it in question." (12 How., 76-7.)

The granting words in that case are precisely the same as they are in this case. It follows, then, that the act of Congress of June the 10th, 1852, was a *present grant*, wanting identity only to make it perfect; that when the definite location of the line or route of said railroad was filed in the office of the commissioner of the general land office on the 10th of June, 1853, it thereby gave identity to "every alternate section of land designated by even numbers for six sections in width on each

side of said road." Consequently the title was divested out of the United States and vested in the State of Missouri, for the purposes of the trust. The land department could tell just as well then what lands were granted to the State under said act of Congress as if it had sent its surveyor-general with a corps of surveyors and had them to have ascertained the same by an actual admeasurement. The filing of the definite location gave precision to the title.

At the time this act was passed, there was no general act in force providing for issuing documentary evidence of title in such cases by the United States, and consequently we must find the effect of the act in its own language and provisions. As nothing more remained to be done in any office of the government, after filing the map of the definite location of the line or route of said road, the effect must be to divest the title to all lands within the purview of the grant out of the United States and vest it in the State. No patent or other documentary evidence of title was any more required or necessary under this act than under the act of March the 6th, 1820, granting the sixteenth section of land in every township to the State for school purposes. Who ever heard of a patent being issued for lands granted for school purposes? It is higher evidence of title than a patent. "It was the direct grant of the fee which had been in the United States, by the government itself, whereas the patent was only the act of its ministerial officers." (Per Justice Baldwin in Grignon's Lessee, vs. Astor, *et al.*, 2 How., p. 344.) It is the act of the government itself and is equivalent to a conveyance with livery of *seisin*. (Enfield vs. May, 11 New Hampshire Rep., 520; Enfield vs. Permit, 5 *id.*, 280; Wilcox vs. Jackson, 13 Pet., 498.)

The fourth section of the act of the general assembly of said State of September the 20th, 1852, required the Hannibal and St. Joseph Railroad Company to *accept* said act "and all grants" therein "contained" within six months after the passage thereof. It was accepted within the time and in the manner prescribed. The effect of that acceptance, under the act of Congress of June the 10th, 1852, and the said act of the general assembly of said State of September the 20th, 1852, was to divest the title out of the United States and vest it in the Hannibal and St. Joseph Railroad Company, to all the lands falling within the purview of the grant. But what particular lands were embraced in the grant could only be ascertained by a definite

location of the line or route of the Hannibal and St. Joseph railroad. Hence the former of said acts required the following to be done, viz: "A copy of the survey of said road, made under the direction of the legislature of the said State, [States], shall be forwarded to the proper local land offices respectively, and to the general land office at Washington City, within ninety days after the completion of the same." This was done. Then the Land Department had all the evidence necessary to ascertain what lands came within the provisions of the grant, as all the lands along the line or route of said road had been surveyed many years before, and the surveys thereof were on file in the general land office. No re-survey or other act, outside of the General Land Office, was necessary. The definite location identified the lands and gave precision to the title. The grant was thereby consummated, and "every alternate section of land, designated by *even* numbers, for six sections in width on each side of said road," became solemnly dedicated "for the purpose of aiding in making the railroad aforesaid." The title that before was inchoate, then became consummate. The title that before was indefinite, then became definite. The fee that before was in the United States, then became vested in the Hannibal and St. Joseph Railroad Company. The Hannibal and St. Joseph Railroad Company, by accepting and complying with the terms of the grant, became a purchaser of said lands for a *valuable consideration.* (Jackson vs. Pike, 9 Cow., 69.)

What was the consideration? 1st. "The said railroads shall be and remain public highways for the use of the Government of the United States FREE FROM TOLL OR OTHER CHARGE upon the transportation of any property or troops of the United States." 2nd. "The United States mail shall at all times be transported on said railroads, under the direction of the Post Office Department, at SUCH PRICE AS CONGRESS MAY BY LAW DIRECT." 3rd. "That the sections and parts of sections of land which, by such grant, shall remain to the United States, within six miles on each side of said roads, shall not be sold for LESS THAN DOUBLE THE MINIMUM PRICE OF THE PUBLIC LANDS WHEN SOLD." 4th. The acceptance of said grant imposed on the Hannibal and St. Joseph Railroad Company an obligation to build said road, which might have been enforced. (Charles River Bridge vs. Warren Bridge, 7 Pick., 446-7-8; Regina vs. B. & P. Railway Co., 9 Car., 478; S. C. 6 Jurist, 804; Lyme Regis vs. Henly, 5 B.

and Adol., 77; S. C. 5 Bing., 91; Rex vs. Hastings, 1 D. & R., 148; S. C. 5 B. & A. 692; Cohen vs. Wilkinson, 12 Beav., 125; S. C. 13 Jurist, 621.)

The Hannibal and St. Joseph Railroad Company was a purchaser of said lands, from the State, for a *valuable consideration.* The stock of said Company represents all its property. (The State vs. The Hannibal and St. Joseph Railroad Company, 37 Mo., 265.) By the 24th section of the act of January the 27th, 1837, and specially made applicable to said Company by the act of the General Assembly of said State of February the 16th, 1847, (R. R. Laws, pp. 7 and 18,) "the stock of said Company shall be exempt from all State and county taxes." By the 3rd section of the act of September the 20th, 1852, granting said lands to the said Company as aforesaid, it is required to "pay into the treasury of the State a sum of money equal to *the amount of the State tax on other real and personal property* of like value, for that year, upon the actual value of the road bed, buildings, machinery, engines, cars and other property of said Company, which shall be as *a consideration to the State for the execution of the trust reposed in the State,* by an act of Congress of the United States, approved June 10th, 1852, entitled," &c.

The Company accepted said grant at a meeting of the board of directors held on the 7th of March, 1853, and thereby agreed to pay said "*consideration.*" For this "consideration" the State granted the "full and complete title" to the lands aforesaid to "the Hannibal and St. Joseph Railroad Company, for the uses and purposes, and subject to the conditions, reversion and provisions set forth and contained in said act of Congress."

By this compact, the State, "for a *valuable*" consideration, "granted all its right, title and interest in and to the lands falling within the purview of the grant, to the Hannibal and St. Joseph Railroad Company. And, as the State had not dedicated the lands falling within the purview of the Swamp Land Grant, whatever inchoate or equitable title it acquired by said grant, passed by the execution of said compact to said Company. It follows, then, that the State and its grantees claiming under the Swamp Land Grant are *estopped* from setting up such inchoate or equitable title.

The lands embraced in the grant amounted to 601,329 $\frac{32}{100}$ acres, which would have aggregated the sum of $751,661.73, sold at the minimum price at which they had been offered for

many years prior to the grant. The road more than paid the federal government ten fold during the late rebellion alone in transporting troops and munitions of war. A large portion of the lands which remained to the United States, after making said grant, were sold at public sale for triple, quadruple and even quintuple the price at which they had been offered and remained unsold for want of purchasers; and none of said lands were sold for less than *double* said price. All have been long since sold. So that if there had been *no other* consideration than the *ready* market and *enhanced* price for which the Government was enabled to sell said lands in consequence of said grant, it drove a very profitable bargain.

That the *acceptance* of the grant contained in the act of Congress of June the 10th, 1852, by the Hannibal and St. Joseph Railroad Company, constituted a compact, irrevocable without the consent of both parties, by which the lands aforesaid were dedicated "for the purpose of aiding in making the railroad [railroads] aforesaid," is conclusively shown by the construction given that portion of the sixth section of the act of Congress of March the 6th, 1820, granting the sixteenth section to the State for school purposes. Says Justice Daniel in delivering the opinion of the court, (Ham vs. The State of Missouri, 18 How., p. 130; S. C., 19 Mo., 592.)

"It would seem not to admit of rational doubt, that the act of Congress, of March 6, 1820, authorizing the people of the Territory of Missouri to form a constitution and state government, taken in connection with the ordinance of the State Convention of the 19th of July, 1820, amounted not merely to a grant for the use of schools, of the 16th section of every township of public lands in the Territory, but, further, to a positive condition or mandate, so far as Congress possessed the power to impose it, *for the dedication of those sections to that object.*"

That the acceptance of said grant constituted a compact between the United States and the Hannibal and St. Joseph Railroad Company is also shown by the construction given to the act of Congress of June 23, 1836, (vol. 5, p. 59, 60, U. S. Stat. at Large,) granting school lands to the State of Michigan, and the acceptance thereof by the legislature of said State. Says Justice Campbell, in construing said grant, (Cooper vs. Roberts, 18 How., 177,) "The appropriation of public lands for that object became a fundamental principle, by the ordi-

nance of 1787, which settled terms of compact between the people and States of the northwestern territory, and the original States, *unalterable except by consent.*"

Again, that the survey of the township and designation of the section *severed* it from the mass of public lands, and the title of the State became a legal title. He says: "Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object upon which it can attach, and if there is no legal impediment, the title of the State becomes a legal title. The *jus ad rem*, by the performance of that executive act, becomes a *jus in re*, judicial in its nature, and under the cognizance and protection of the judicial authorities. Gaines vs. Nicholson, 9 How., 356," (18 How., 179.)

Again says Justice Nelson delivering the opinion of the court in construing the act of Congress granting school lands to the State of Mississippi, in the case of Gaines *et al.* vs. Nicholson *et al.*, (9 How., 364-5): "The State of Mississippi acquired a right to every sixteenth section, by virtue of these acts, on the extinguishment of the Indian right of occupancy, the title to which, in respect to the particular sections, became vested, if vested at all, *as soon as the surveys were made and the sections designated. No patent was necessary*, or is ever issued, for these school sections."

The foregoing authorities clearly show that the act of Congress of June the 10th, 1852, the acceptance by the Hannibal and St. Joseph Railroad Company of the grant therein as required by the 4th section of the act of the general assembly of the State of Missouri, of September 20th, 1852, and the filing of a copy of the location of the Hannibal and St. Joseph railroad as aforesaid, constituted a severance of the lands granted from the mass of public lands and vested the complete legal title to said lands in the Hannibal and St. Joseph Railroad Company, without any patent or other documentary evidence of title.

But it is contended by the other side, that the grant of said lands to the State, to aid in the construction of the Hannibal and St. Joseph Railroad, is subject to the following proviso: "That any and all lands *heretofore reserved* to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal

improvement, or for any other purpose whatsoever, be and the same *are hereby reserved* to the United States from the operation of this act, except so far as it may be found necessary to locate the route of the said railroads through such reserved lands, in which case the right of way only shall be granted."

What is a reservation? It is defined as follows: "A reservation is a clause in a deed, whereby the grantor doth reserve some *new thing* to himself out of that which he granted before. This doth differ from an exception, which is ever part of the thing granted, and of a thing in *esse* at the time; but this is of a thing new created, or reserved out of a thing demised, that was not in *esse* before." (Shep. Touch. 80; 4 Kent, 468 side p: Craig vs. Wells, 1 Kern., 315,) It will be seen, therefore, that a reservation is always of something taken back out of that which is clearly granted; while an exception is of some part of the estate not granted at all. A reservation is never of any part of the estate itself, but of something issuing out of it, as for instance, rent, or some right to be exercised in relation to the estate, as to cut timber upon it. An exception, on the other hand, must be a portion of the thing granted and can be of nothing else; and must also be of something which can be enjoyed separately from the thing granted. (Shep. Touch. 77, 78; Cunningham vs. Knight, 1 Barb., 399; Starr vs. Child, 5 Denio, 599.)

By reference to the acts of Congress making *reservations* of lands in Missouri, we find the following act of February 15th, 1811, reserving from sale the 16th section in every township; one township for a seminary of learning; and all salt springs and lead mines. (§ 10, chap. , 2 vol. U. S. Stat. at Large, p. 621;) also the act of March 3, 1811, "providing for the adjustment of claims to lands, and for the sale of the public lands in the territories of Orleans and Louisiana, and to repeal the act passed for the same purpose, and approved February sixteenth, [fifteenth], one thousand eight hundred and eleven," *id* p. 662. This act made provision for adjusting what is known in Missouri as "the Old Spanish and French Claims," originating out of the grants made by the Spanish and French governors whilst the Louisiana territory belonged to Spain and France, prior to the treaty of April the 30th, 1803, by which said territory was ceded to the United States.

The next act is the act of June the 13th, 1812, entitled, "An act making further provision for settling the claims to land in the territory of Missouri." (2 vol. U. S. Stat. at Large, 748.)

This act *confirms* the title to town or village lots, out lots, common field lots and commons, in, adjoining and belonging to, the several towns and villages therein mentioned. It also authorizes the President of the United States to *reserve* for military purposes such of said lots as he may think proper; and also *reserves* one twentieth part of said lots, lands, &c., as are not rightfully owned or claimed by any private individual, or held as commons belonging to said towns, for the support of schools. This latter reservation gave rise to the St. Louis public schools. (Hammond vs. The St. Louis Public Schools, 8 Mo. 65.)

By the act of March the 6th, 1820, already referred to several times in this brief, the sixteenth section in every township reserved for school purposes, and all salt springs, not exceeding twelve in number, were *granted* to the State of Missouri.

The next grant, that the grant contained in the act of June the 10th, 1852, could come in conflict with, was the act of September the 4th, 1841, entitled, "An act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights," in which the following language is used: "That there shall be *granted* to each State specified in the first section of this act five hundred thousand acres of land for purposes of internal improvement,..... the selections in all of the said States to be made within their limits respectively in such manner as the legislatures thereof shall direct,..... on any public land except such as is or may be reserved from sale by any law of Congress or proclamation of the President of the United States."

This grant was formally *accepted* by a joint resolution of the General Assembly of the State of Missouri, passed on the 25th day of February, 1843. (Session Acts of 1843, p. 400.) By an act of the same session provision was made for the selection of said lands as required by said act of Congress. [*Id.* p. 78.]

By the second section of the act of March the 3d, 1807, (2 U. S. Stat. 446,) persons were prohibited from working lead mines and salt springs without the approbation of the President of the United States, who was authorized to cause such mines and springs to be leased for a term not exceeding three years. This provision being in a general act was applicable to all lead mines and salt springs on any public lands acquired by treaty. The cases of the United States vs. Gear, (3 How. 120,) and the United States vs. Gratiot *et al*, (14 Pet. 526,) show the construction given to similar acts by this Court.

Suppose some of the lands falling within the purview of the grant "to the State of Missouri for the purpose of aiding in making the railroads aforesaid" had contained mines of the precious metals, would not such lands have been regarded as "reserved to the United States" "by competent authority?" (7 Opin. Att. Gen. 536; The United States vs. Parrott, 1 McAll, 271.)

In construing the act of March the 3d, 1811, (*ut supra*,) the act of February the 17th, 1818, (4 U. S. Stats. 407,) and the act of July the 9th, 1832, (4 U. S. Stats. 567,) this Court has prescribed the manner in which a reservation of the public lands shall be made by the Department of Public Lands in the case of Menard's Heirs vs. Massey (8 How. on p. 309,) in the following language:

"All these acts of Congress, with their exceptions, address themselves especially to the Department of Public Lands, as by them that department must be guided. In reserving lands from sale, *it was necessary to know where they were situated, and how far they interfered with the public surveys.* Either the President, or some other officer, must have had the power to designate the lands as those adjoining to salt springs and lead mines; or it must have appeared in some public office appertaining to the Land Department *what the boundaries of reserved lands were*; and if it did not appear, no notice of the claim could be taken by the surveyors, nor by the registers and receivers when making sales. This was a conclusion that has from necessity been acted on at the land offices; and as Cerre's claim was not surveyed before the confirmation took place, no boundaries of his tract could be recognized when the public surveys were made and the lands sold. He claimed no "tract of land." The laws *refer to specific tracts that are claimed;* it is not material whether the boundaries are proper, and according to the concession, or the claim be just or otherwise, so that the tract claimed be certain. This was also decided in the cases just cited. Certainly, a mere *floating claim*, founded on a concession that was ordered to be located by survey, and where no survey or location had been made, was not protected by the act of 1811. An actual survey is not indispensable; *but boundaries must appear*, in some form, from the notice of claim and the accompanying evidences filed with the recorder. *If, from these, the tract could not be laid down on the township surveys, then the land could not be reserved from sale;* although, by the concession, and by the notice, a particular spot, (as the Big Spring of the Maramee,) was referred to in general terms as the place where the land should lie."

Let us test the case under consideration by the rule thus prescribed by this court, and ascertain whether the record in this case either shows, or even tends to show in any particular, that the land in controversy was reserved from sale on the 10th day of June, 1852, under any act of Congress? Does the record show that the Secretary of the Interior as the head of the Land Department, or any officer subordinate to him in said Department, had designated said land as falling within any reservation? It does not. Does it show that said land

falls within the boundaries of any reservation? It does not. Is there anything in this record, that would impart notice to the registers and receivers making sales, that said land was reserved from sale? Nothing. Does any one of the laws above quoted refer to this particular land in controversy as a specific tract claimed under such law? Nothing. Was it not highly necessary that such reservation should be made to appear in some of these ways so as to prevent inextricable confusion of titles and endless strife and litigation, the usual concomitants of such confusion? If the laws did not mark the boundaries of the lands reserved, [none of the laws quoted do,] how can this confusion and the strife and litigation resulting from it be prevented, if the Land Department be not allowed to mark the boundaries of the lands reserved.

The proviso in the act of Congress of May the 15th, 1856, (11 Stats, 9,) making a grant of lands to the State of Iowa, in alternate sections, to aid in the construction of certain railroads in that State, and which is an exact copy of the proviso now under consideration, has been coustrued by this court in the late case of Wolcott vs. Des Moines Co. (5 Wal. 681.) It shows what is meant by the words "or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement," and the great respect that is paid by this court to the action of the Land Department. In that case there was an *actual* reservation of the land in controversy made by the Land Department from the operation of the act of Congress of May the 15th, 1856. In this case there was no such reservation made by the Land Department. In that case the record showed an actual reservation. In this case it is as silent as the tomb of the Capulets! It is matter of defence to show an actual reservation. (1 Kent, 463, side p.) The defendant should have shown an actual reservation made by the Land Department, so as to have made it available as an outstanding title. (Henderson vs. Tennessee, 10 How. 323.) Or he should have shown an actual reservation made by the Land Department under the act of September the 28th, 1850, and then he would have brought himself fairly within the purview of the proviso under consideration, and the defence would have been valid. (Pacific Railroad Company vs. Lindell's Heirs, 39 Mo. 330; Easton vs. Salisbury, 21 How. 426; Fenn vs. Holme, *id.* 481; Hale vs. Gaines, *et al*, 22 *id.* 144.)

Here are a half dozen acts of Congress either making reservations, or authorizing the Land Department to make reservations. By what authority can the defendant say that the land in controversy was reserved under the act of September the 28th, 1850, in the absence of any *actual* reservation, when there are so many other acts under which it might have been reserved?

Suppose an individual had entered said land at the price fixed by Congress, paid for it and had obtained a patent therefor. He would have been a purchaser for a valuable consideration. Would not the law protect him as such against the vague and indefinite so-called grant under the act of September the 28th, 1850? Could such person have maintained an action of ejectment on such entry? It is affirmed that he could. And if an individual purchaser could have maintained an action of ejectment, why can not the Hannibal and St. Joseph Railroad Company? Is it not a purchaser of said land for a valuable consideration as well as an individual would have been under the circumstances supposed? Is it not protected from such a "float" as this pretended swamp land claim? (Menard's Heirs vs. Massey, 8 How. 314; Delauriere vs. Emison, 15 *id.* 525; Cousin vs. Blanc's Executors *et al*, 19 *id.* 210; Denise vs. Ruggles, 16 *id.* 242.)

If the foregoing reasoning be found correct, it follows that the title to land can be acquired by act of Congress operating *proprio vigore*. (The United States vs. Brooks, 10 How. 442; Glasgow *et al* vs. Hortiz *et al*, 1 Black, 595; Guitard vs. Howard, 16 How. 508.)

It now remains to be considered whether the act of Congress of September the 28th, 1850, (vol. 9, U. S. Stat. at Large, p. 519,) is such reservation as is contemplated by the proviso aforesaid.

V. The act of Congress entitled, "An act to enable the State of Arkansas and other States, to reclaim the 'swamp lands' within their limits," approved September the 28th, 1850, did not pass the title in fee to said States, *proprio vigore*, and unconditionally, for want of words of *present grant*. It was only an *overture* on the part of the United States to make a *donation* of said lands to the States in which such lands were situated, which was not binding until *accepted* by the States. Such *acceptance* could only be evidenced by the Secretary of the Interior "making out an accurate list and plats of the lands

described as aforesaid, and transmitting the same to the Governor of the State,..... and at the request of said Governor, causing a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the State."

"It is an established rule in the exposition of statutes, that the intention of the lawgiver is to be deduced from a view of the *whole*, and of every part of a statute, taken and compared together." [1 Kent, 462, side p. cites Co. Litt, 381, a; Marshall C. J., 12 Wheat. 332; Mason vs Finch, 2 Scam. 224.] If the construction of the act of Congress of September the 28th, 1850, depended entirely on the words used in the first section, it might be considered as using words of *present grant*, although the words "*shall be*" are used even in that section. But when you look at the title you do not find any words importing a *present* grant, or even an *intention* to make a present grant, as you do in the act of Congress of June the 10th, 1852; and when you look at the second section you find no words of *present grant* or even *any* words of grant used in it as you do in the corresponding section of the act of 1852. It imposes "the duty" on "the Secretary of the Interior.....to make out an accurate list and plats of said lands described as aforesaid, and transmit the same to the Governor of the State." The overture is then complete on the part of the United States. But when he shall have performed this duty, the title is not thereby divested out of the United States. It is then left to the Governor of the State, as its legal head, to determine whether he will on behalf of the State, *accept* the lands embraced in said "list and plats." Unless he accepts, there is no agreement and no contract is made. It is of the very essence of this compact, as in all contracts, that an offer shall be made on one side and *accepted* on the other, before the same shall become binding. There is no evidence in the record in this case that the land in controversy ever was selected by the Secretary of the Interior and put upon the "accurate list and plats" of the "lands described" in said act and transmitted "to the Governor of the State;" nor is there any evidence in the record that the Governor ever made a "request" for a patent to be issued to the State therefor. If an overture had thus been made on the part of the United States, and accepted by the Governor of the State, the compact would have been struck, and like an executory contract between individuals, the faith of the United States would have been pledged to have executed their contract, by causing "a patent to be issued to the State therefor."

The whole tenor and spirit of the second section of said act show that it was not, nor even intended to be, a *present grant.* On the contrary, that it was simply intended to make, on behalf of the United States, an overture of the Swamp and Overflowed Lands to the States in which said lands were situated, for their free acceptance in the manner therein prescribed. The United States could not compel the States to accept said lands; and without acceptance the grant is necessarily void. (Ellis vs. Marshall, 2 Mass., 277; 1 Kyd on Corp., 65, 66; Ang. and A. on Corp., § 82; Dartmouth College vs. Woodward, 4 Wheat., 518.) But it may be contended by the opposite side, that the presumption is that the State accepted the overture of said lands, (for it would be a manifest solecism to call it a grant.) This presumption cannot be invoked for two reasons: 1st. The second section provides for an *express* acceptance of said lands by the State in these words: "at the *request* of said Governor." 2nd. Where it is manifest from the grant or conveyance that it is for the *benefit* of the grantee and there is nothing required to be done on his part, then an *acceptance* may be presumed on his part. Says C. J. Spencer, in delivering the opinion of the court in the case of Jackson vs. Bodle, (20 John., 187): "It is necessary to the validity of a deed, that there be a grantee willing to *accept* it. It is a contract, a parting with property by the grantor, and an acceptance thereof by the grantee. An acceptance will be presumed, from the *beneficial* nature of the transaction, where the grant is not absolute."

Now the grant in this case is not absolute; it is not manifest that the swamp and overflowed lands were of a beneficial nature to the States in which they were situated. In the States north-west of the Ohio river, the United States had owned and offered them for sale for upwards of fifty years prior to the passage of said act, and had found no one to take them at the minimum price, although the lands adjacent to them had been sold and cultivated in some instances for nearly two generations. On the contrary, it is manifest, that the State would have made a very bad bargain, if it had accepted the swamp and overflowed lands situated in the counties of New Madrid, Dunklin and Pemiscot, and, at "the request of the Governor," the Secretary of the Interior had caused "a patent to be issued to the State therefor," and by such acceptance had obligated the State to reclaim said lands by making the necessary "levees and drains."

Applying the rules of construction of statutes and contracts to the act of September the 28th, 1850, it only authorized the Secretary of the Interior to enter into a compact with the Governors of the States in which any swamp and overflowed lands were situated, by which the United States became bound to convey said lands to such States. And in this case, as there never has been any *acceptance* by the Governor on behalf of the State of the land in controversy, the defendant in error has not even *an executory* to contract to stand upon.

The foregoing reasoning is upon the assumption that the act of September the 28th, 1850, is not a *grant* either in *praesenti* or *futuro;* but that it simply prescribes terms, which, if pursued, will lead to, and culminate in, an absolute grant. A grant is a contract executed. Says C. J. Marshall in delivering the opinion of the court in the case of Fletcher vs. Peck, (6 Cran., 87):

"A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the Governor. A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to re-assert that right. A party is, therefore, always estopped by his own grant."

So thoroughly has the Federal Government acted upon the assumption, that a grant of lands to a State is a contract, not binding upon such State until accepted, that it has always required the State to *accept* such grant in some positive unequivocal manner. See the act of April the 30th, 1802, providing for the admission of Ohio into the Union, (§ 7, chap. 40, 2 vol. U. S. Stat., 175); the act of April the 19th, 1816, providing for the admission of Indiana into the Union, (§ 6, chap. 57, 3 vol. *id.*, 290); the act of April the 18th, 1818, providing for the admission of Illinois into the Union, (§ 6, chap. 673, *id.*, 430); and the ordinance of July the 13th, 1787, (1 vol. *id.*, 51), showing the articles of compact between the original States, and the people and States in the territory northwest of the Ohio

river, which was unalterable except by *consent*. The foregoing and other acts making grants of land, which might be cited, show that the Federal Government itself has always treated such grants as contracts. And being contracts, the principles of law applicable to contracts between individuals are applicable.

Now it is one of the very fundamental principles of a contract that to constitute the agreement, there must be an *offer* on one side and an *acceptance* on the other. The terms may be either executed or executory. A grant is an executed contract. The defendant in error does not bring himself within either a contract executed or a contract executory.

VI. The States could not, under the act of September the 28th, 1850, acquire even an *inchoate* title to any swamp and overflowed lands, until the Secretary of the Interior had made out "an accurate list and plats" thereof. This action on the part of the Secretary of the Interior constituted the first step in the execution of the authority and trust confided to him. The next step was to "transmit the same to the Governor of the State." As the United States was the owner of said lands, Congress acted upon the principle, *cujus est dare, ejus est disponere*. If they could grant, they could prescribe terms to the grant. The duty of determining what were swamp and overflowed lands, within the purview of the act of September the 28th, 1850, was imposed on the Secretary of the Interior. Why was this duty imposed upon this officer?

By the third section of the act of Congress of March the 3d, 1849, (chap. 108, 9 vol. U. S. Stat. at Large, p. 395), creating the office of Secretary of the Interior it is provided as follows:

"That the Secretary of the Interior shall exercise and perform all the duties in relation to the General Land Office, of supervision and appeal, now discharged by the Secretary of the Treasury."

The Secretary of the Interior had in his possession and under his control *ex officio* all the surveys of the public lands. The field notes of these surveys showed precisely what lands were swamp and what were overflowed when the surveys were made. As the laws of nature are like the laws of the Medes and Persians, the fair inference is that no more lands became swamp and overflowed after such surveys than were such at the time of the survey. As the circumjacent country became opened up and settled, the evident tendency would be to de-

crease, instead of increase, the quantity of swamp and overflowed lands. As the head of the Land Department of the United States, he possessed, or had under his control, all the evidence necessary to enable him "to make out an accurate list and plats of the lands described as aforesaid." These field notes, made by *disinterested* and competent men, from actual observation of the lands themselves, contained vastly more reliable evidence than the *ex parte* affidavits of interested parties, who were willing to give their *opinion*, that the greater part of a particular legal sub-division, was so swampy or overflowed, as to be "made unfit thereby for cultivation." These willing witnesses, not being subjected to one of the great tests of truth, namely, a *cross examination*, their *voluntary* opinion, thus given, is comparatively valueless for the purpose of enlightening the Secretary and thereby enabling him "to make out an accurate list and plats of the lands described as aforesaid." He has made his decision, however, and the land in controversy is not embraced in that "accurate list" which the act of September the 28th, 1850, required him "to make out and transmit" "to the Governor of the State."

The law does not prescribe what kind or how much evidence he shall be governed by, in determining what were and what were not swamp and overflowed lands within the purview of the law. That is left entirely to his judgment. Whether he was governed entirely in making out "an accurate list" of said lands by the evidence on file in the Land Department, or by the *exparte* affidavits of willing witnesses and *interested* parties, or by both, we are not enlightened by the record in this case. Suffice it to say, however, that it is a well settled principle of law, that it will presume that every officer discharges his duty under the law, and he who impeaches an act done under a law, as illegal, must prove the allegation. And in the absence of fraud, collusion or mistake, whatever decision he shall make is final and conclusive, unless an appeal or some mode of review is provided. Says Justice Baldwin in delivering the opinion of the court in the case of the United States vs. Arredondo *et al.* (6 Pet., on p. 729):

"It is an universal principle, that, where power or jurisdiction is delegated to any public officer, or tribunal over a subject matter, and its exercise is confided to his or their discretion; the acts so done are binding and valid as to the subject matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual

claiming a right under the acts done, and the public, or any person denying its validity, are, *power in the officer, and fraud in the party.* All other questions are settled by the decision made or the act done by the tribunal or officer; whether executive—(1 Cr. 170—171)—legislative, (4 Wh. 423; 2 Peters, 412; 4 Peters, 563)—judicial, (11 Mass. 227; 11 S. & R. 429; adopted in 2 Peters, 167, 168), or, special, 20 J. R. 739, 740; 2 Dow. P. Cas. 521, &c., unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law."

"The public acts of public officers purporting to be exercised in an official capacity and by public authority, shall not be presumed to be an usurped, but a legitimate authority, previously given or subsequently ratified, which is equivalent. If it was not a legal presumption that public and responsible officers claiming and exercising the right of disposing of the public domain, did it by the order and consent of the government, in whose name the acts were done, the confusion and uncertainty of titles and possessions would be infinite, even in this country; especially in the states whose tenures to land depend on every description of inceptive, vague and inchoate equities, rising in the grade of evidence, by various intermediate acts, to a full and legal confirmation, by patent, under the great seal." (*Id.*, p. 727.)

Again, that this court regards the decision of the Secretary of the Interior as conclusive, is shown in its opinion in the case of Campbell *et al.* vs. Doe, (13 How., on p. 249), in which the Secretary of the Treasury had selected another section of land in lieu of the sixteenth section. Says Justice McLean:

"But in whatever light this may be received, we are clear, that the Secretary of the Treasury had the power, under the act of Congress, to make the selection; and his decision declaring the entry of Hamilton invalid, was, under the circumstances, *conclusive.*"

Why is not the fact that the land in controversy was not put upon the "accurate list" of swamp and overflowed lands enough to satisfy any court that it is not, and was not, either swamp or overflowed land on the 28th day of September, 1850? The uncontroverted evidence of J. M. Willis shows that it lies between three and four miles of the Hannibal and St. Joseph Railroad, and that said railroad was completed in February, 1859. Moreover, it was *approved* by the Secretary of the Interior to the Hannibal and St. Joseph Railroad Company, on the 18th day of November, 1854. It is true, the approval was made "subject to any *valid* interfering right." But there was no *valid* interfering right. Here were two or more acts of Congress granting, and offering to grant, a large part of the Public Domain. Upon the Secretary of the Interior, as the head of the Land Department of the United States, was imposed the duty of executing said acts. He has discharged that duty

faithfully. That execution on all principles of law, of justice, of reason and of human action, must be considered a *finality.*

The courts of the United States do not interfere with or control the officers of the Land Department in the disposal of the Public Domain. The State courts have no right to do so. "Congress is invested by the Constitution with the power of disposing of, and making needful rules and regulations respecting it. Congress has declared, as we have said, by its legislation, that in such a case as this a patent is necessary to complete the title. But in this case no patent has issued; and therefore by the laws of the United States the legal title has not passed, but remains to the United States.

Now, if it were competent for a State Legislature to say, that notwithstanding this, the title shall be deemed to have passed; the effect of this would be, not that Congress had the power of disposing of the Public Lands, and prescribing the rules and regulations concerning that disposition, but that Illinois possessed it. That would be to make the laws of Illinois paramount to those of Congress, in relation to a subject confided by the Constitution to Congress only, and the practical result in this very case would be by legislation, to take from the United States their own land, against their own will, and against their own laws. We hold the true principle to be this, that whenever the question in any Court, State or Federal, is whether a title to land which had once been the property of the United States has passed, *that question must be resolved by the laws of the United States,* but that whenever, according to those laws the title shall have passed, then that property like all other property in the State, is subject to state legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States." (Per Justice Barbour in Wilcox vs. Jackson, 13 Pet. on pp. 516—17.)

The Courts have no right to go behind the decision of the Secretary of the Interior. Congress, in its wisdom, has seen proper to confide to the Secretary of the Interior, the execution of the acts which are in controversy. Under the act of September the 28, 1850, he is specially charged with the duty of selecting the swamp and overflowed lands. He has executed the trust thus confided to him, and in the absence of *fraud, collusion or mistake,* his decision is final and conclusive on all the world. A father has two sons at school, and he declares that a certain tract of land shall be given to that one of

them, who shall have best demeaned himself, in the judgment of the preceptor. The preceptor without fraud or collusion reports in favor of one of them; the land is given accordingly. Has a court a right to interfere and examine the correctness of the decision of the preceptor, with a view to give the land to the other son? Surely not. But this is not because the decision of the preceptor is a judgment, in a judicial sense, binding until it is set aside; but because the *owner* of the land prescribed the terms on which it shall be conveyed. The condition is, that it shall be on the *judgment* of the preceptor, which is final, and for a court to interfere to correct that determination, would be to give the land, according to the opinion of the court, and not the preceptor, which would be a manifest violation of the will of the owner.

The State of Missouri was not a purchaser of the swamp and overflowed lands situated within her limits for a *valuable* consideration. She acquired them only as a *bounty*. She is a mere *volunteer*. Hence, the grant, (if it is not a misnomer to apply the term grant, which imports *ex vi termini* a contract *executed*,) to the State under the act of Congress of September the 28th, 1850, which only authorized the Secretary of the Interior to make an offer of said lands as a donation, must be construed *strictly* against the State. This is the well established rule of construction in such cases.—Nothing passes by implication.—"If the meaning of the words be doubtful in a grant, designed to be a general benefit to the public, they shall be taken most strongly against the grantee and for the Government, and therefore should not be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed; and if those do not support the right claimed, it must fall." (Per Justice Clifford in Rice vs. Railroad Co., 1 Black, 380).

Now let us apply this rule of *strict* construction to what the other side insist with great zeal is a *present* grant of all the lands in the State of Missouri, which *prejudiced* witnesses and *interested* parties might swear that, in their *opinions*, was swamp or overflowed on the 28th day of September, 1850, and ascertain if the defendant has in any particular, brought himself within the strict terms of said act; for if he has not, his claim to the land in controversy, in the language of Justice Clifford, "must fall."

Was it ever put upon that "accurate list" of swamp and overflowed lands by the Secretary of the Interior, which it

was "the duty" of that officer "to make out and transmit the same to the Governor of the State?" Was the *acceptance* of said land ever evidenced in the only manner that it could be under said so-called grant? Did ever the Secretary of the Interior "at the *request* of said Governor, cause a patent to be issued to the State therefor?" Not one of these essential acts has ever been done. By the express provision of said act, the title—the fee simple—to said land did not pass until the issuance of a patent. How then in the name of law, can the other side contend, that the act of September the 28th, 1850, "was a present absolute grant thereof to the State of Missouri," as was done in the first instruction given at the instance of the defendant? The State has no title, and could acquire none, only as it brought itself within the strict terms of the so-called grant. Congress in making provision for disposing of that portion of the public lands known as swamp and overflowed, prescribed how the State of Missouri might acquire the legal title thereto if it desired to do so. The legal title was in the United States. Congress could, according to the Constitution, prescribe such terms to the so-called grant as it saw proper. The State must comply strictly with the terms offered, or it could acquire no title. Such is the well established rule of construing public grants. But says the defendant in his first instruction, the lands sued for were swamp or overflowed lands *in fact*, on the 28th day of September, 1850, and as "the act of Congress of that date was a *present absolute grant thereof* to the State of Missouri," I have a right *to show that fact by the testimony of witnesses before a jury of my peers;* and if they find from such testimony the fact to be that said land was on the 28th day of September, 1850, swamp or overflowed, then the court must render a judgment accordingly, which will be a complete muniment of title against all grants made to the Hannibal & St. Joseph Railroad Company for the same land! This was the construction given by the circuit court of Macon county, Missouri, to the so-called swamp land grant. And as the State has never come or brought herself within the strict terms of the act of September the 28th, 1850, she had no patent to evidence her title to said land, notwithstanding said act expressly required a patent to convey the fee simple to her. This is the only possible way left for the defendant to defend himself against the perfect *legal* title shown by the Hannibal & St. Joseph Railroad Company. (Glasgow *et al* vs. Hortiz *et al*, 1 Black, 595; Giutard vs. Howard, 16 How, 508.)

Now is this a correct construction of the act of September the 28th, 1850? It is affirmed that it is not. It has already been shown that said act did not pass the title to the swamp and overflowed lands *proprio vigore* to the State; that the State could only acquire the title in the manner prescribed by said act; and having failed to bring herself within the *strict* terms of said act, that she did not even acquire an inchoate or equitable title to the land in controversy. Was the court right then in its ruling by which it permitted the defendant to show the character of the land in controversy by the *testimony* of witnesses? It certainly was not. Instead of abiding by the judgment and decision of the Secretary of the Interior—to whose judgment and decision alone Congress had confided the dispensing of its bounty—the construction given to said act by the circuit court of Macon county, Missouri, virtually allowed the defendant the right to appeal therefrom to his court, and then take the *opinion* of parties who had claims to other land which came within the provision of the so-called swamp land grant, provided always that the judgment and decision of the question were left to them and such *biased* witnesses as they could readily procure to corroborate them should be the criterion by which the character of the land should be judged and decided, and then on such evidence he solemnly found the fact to be, that "the lands sued for were on the 28th day of September, 1850, swamp or overflowed lands, and thereby rendered unfit for cultivation," and rendered judgment that the "plaintiff take and recover nothing by its suit herein, and that said defendant go thereof without day," and it should then have added by way of capping the climax of error, that the plaintiff be *in mercy* for its false claim! Was not this construction substituting the finding and judgment of said court based on the opinion of interested parties and biased witnesses for the judgment and decision of the Secretary of the Interior? And if so, did Congress ever intend by said act, that a State court in Missouri should judge and decide the fact what lands came within the purview of said act and what lands did not? It is not so provided in said act, and as this so-called grant, under the well established rule of construction, must be construed *strictly* against the State, the construction given by said court was a clear and palpable violation of said act. This construction was in effect allowing an appeal from the judgment and decision of the Secretary of the Interior, and upon a review of the same deciding that said

judgment and decision were *erroneous* and therefore they must be reversed; and accordingly said court did reverse them and solemnly adjudged said land to the State's grantee under the so-called swamp land grant! And this too when said act did not provide any appeal or other mode of review.

The Secretary of the Interior had approved the land in controversy to the Hannibal and St. Joseph Railroad Company. *Expressio unius est exclusio alterius.* The approval to the Hannibal and St Joseph Railroad Company under the act of June the 10th, 1852, excludes, by implication as strongly as any express words could make it, the approval under the act of September the 28th, 1850. The Hannibal and St. Joseph Railroad Company is a purchaser of the lands granted under the former act for a *valuable* consideration. And, being so, the grant, under another rule of construction, must be construed *liberally* in favor of the grantee, and in such a manner as to carry out and give full effect to the Legislative intent. (Charles River Bridge *v.* Warren Bridge, 11 Pet., 589, 596, 601, and authorities there cited; Hyman *v.* Read, 13 Cal., 444, 452, 455, 458; Commonwealth *v.* City of Roxbury, 9 Gray, 451.) Now, it has already been shown that the title in fee vested absolutely in the Hannibal and St. Joseph Railroad Company, as soon as said Company filed the map of the definite location of the line or route of the Hannibal and St. Joseph Railroad in the office of the Commissioner of the General Land Office, under the operation of the act of June the 10th, 1852. The title passed *proprio vigore.* The plaintiff can show a complete *legal* title under the operation of said act even without the aid of this latter rule of construction. But still the plaintiff is entitled to its aid as a matter of strict right, and it is accordingly invoked.

The State of Missouri did not possess any right, title or claim to the swamp or overflowed lands situated within her limits until the passage of the act of September the 28th, 1850. This act *created* a right in behalf of the State. She has no right outside of said act. She must look exclusively to the provisions of said act for her rights. It provides all the machinery necessary to execute itself. And as the State is made the recipient of the bounty of Congress, she must bring herself strictly within the provisions of the act granting the bounty. "Beggars must not be choosers." She must not be too greedy. She must not ignore the solemn judgment and decision of the head of the Land Department of the United States approving

the land in controversy to the Hannibal and St. Joseph Railroad Company, and set up a tribunal of her own to review this judgment and decision, and pronounce it *erroneous*, in palpable violation of the very act ~~under~~ which she bases all her rights, and say, because the United States have been munificent to her beyond precedent, still they have not, through their proper and designated officer, to whom they have confided the delicate task of dispensing their alms, been liberal enough. They ought to have given more. The owners are not good judges of what they ought to give. Therefore, the State will take this matter of alms-dispensing into her own hands, and make such disposition of the public domain of the United States as she, through her interested parties, biased witnesses, juries and courts may be of opinion that the United States should have dispensed to her and her grantees. As she claims through the law, she must abide by the award made under it. She cannot claim its provisions when carried out in her favor, and repudiate them when carried out adversely to her own grasping disposition. She must abide by the dispensing of the bounty as made by the owners. The United States have expressly reserved to themselves the right to dispense this bounty. They have exercised this right. The State has no right to gainsay the manner in which it has been exercised. The defendant, claiming in privity with her, is equally estopped with the State to repudiate the approval of the Secretary of the Interior of the land in controversy to the Hannibal and St. Joseph Railroad Company. This view of the relative titles is amply sustained by the decision of this court in the case of Grew *et al*, *vs.* Mezes *et al*, (24 How., 276) in which the defendants offered to show by the testimony of witnesses that the plaintiff's survey, confirmation under it, and patent, were *erroneous* as regarded the western line, and overlapped the land claimed by the defendants under a grant then undergoing investigation so as to have it confirmed, and which had, in fact, been decided by the commissioners, to whom it had been referred, as a valid claim, who ~~have~~ decreed that it should be *confirmed*, and it was then *sub judice* before the district court of the United States, on an appeal taken by the United States, and which decision of the commissioners was affirmed by said district court. Still the court refused to allow the defendants to adduce ~~*parol*~~ evidence to prove the survey of this line to be erroneous, holding that as said survey had been made by the United States Surveyor General for California, (where the respective claims originated out of two

Mexican grants,) who had returned the field notes with a map to the Commissioner of the General Land Office, on the 19th of December, 1856, that said "survey is *conclusive* evidence as to the precise location of the western line of Perlgas as between these parties in this suit. * * * * But in this action of ejectment, the defendants cannot call upon *a jury at their discretion to alter a boundary line which has been legally established by the public officer specially entrusted with this duty.*"

Again, in the same case, on p. 275, says Justice Grier, in delivering the opinion of the court: "The court below refused to admit the testimony, not for its irrelevancy, but its *incompetency;* because the defendants, claiming under a merely *equitable* title, having neither *survey nor patent*, were not in a condition to dispute in a court of law the correctness of the survey made by the public officer or resist the plaintiff's perfect legal title."

Again, that the circuit court of Macon county have no authority to review the decision of the Secretary of the Interior is clearly shown by the opinion of this court in the case of Lafayette's Heirs *vs.* Kenton *et al.* (18 How., on p. 199,) says Justice Catron, in delivering the opinion of the court:

"The courts of justice have no power to *revise* what Congress, or commissioners acting by its authority, have done in their confirmations of the titles here assailed. Against the United States these confirmations are *conclusive*, and they are equally so against General Lafayette."

Again, says Justice Catron, in delivering the opinion of this court in the case of Stanford *vs.* Taylor (18 How., on p. 412,) where the plaintiff offered to prove by ~~parol~~ evidence that the *official* survey was improperly made west of one Robert's tract, and not adjoining it; whereas it should have been made east of the same, and the circuit court refused to admit said evidence, which ruling was assigned for error:

"The law is settled, that where there is a specified tract of land confirmed, according to *ascertained* boundaries, the confirmee takes a title on which he may sue in ejectment. The case of Bissell *vs.* Penrose lays down the true rule.

"But where the claim has no certain limits, and the judgment of confirmation carries along with it the condition that the land shall be surveyed and severed from the public domain and the lands of others, then it is not open to controversy, that *the title attaches to no land; nor has a court of justice any authority in law to ascertain and establish its boundaries*, this

being reserved to the Executive Department. The case of West *vs.* Cochran (17 How., 403,) need only be referred to as settling this point, and the question here is, whether the concession to Perry is indefinite and vague, and subject to be located at different places."

After examining the facts, he adds further: "The *uncertainty* of out-boundary in this instance is too manifest, in our opinion, to require discussion to show that a public survey is required to attach the concession to any land."

That the circuit court of Macon county, Missouri, had no lawful authority to hear ~~*parol*~~ evidence to contradict the judgment and approval of the Secretary of the Interior, of the ~~cause~~ in controversy is further shown in the case of West vs. Cochran, (How., on p. 415,) in which Justice Catron uses the following language, in delivering the opinion of this Court:

"It has often been held by this court that the *judicial tribunals, in the ordinary administration of justice, had no jurisdiction or power to deal with these incipient claims, either as to fixing boundaries by survey, or for any other purpose;* but that claimants were compelled to rely upon Congress, on which power was conferred by the constitution to dispose of, and make all needful rules and regulations respecting the territory and property of the United States. Among these needful regulations was that of providing that these unlocated claims should be surveyed by lawful authority; a consideration that has occupied a prominent place in the legislation of Congress from an early day."

And again in the same opinion he uses the following language:

"It was competent for Congress to take up these titles or rights, and act on them either by legislating directly that each claimant should be confirmed, and have a perfect title to his actual possession lawfully acquired under France or Spain, without ascertaining, in the act of confirmation, or by any special means provided therein, the bounds of claims confirmed. But it was also competent for Congress to provide, that before a title should be given to any possessor, the exact limits of his possession, and the title which the United States was to give, should be defined, and that this should be done by such agencies, and in such manner as might be fixed by Congress. This is in entire accordance with the provisions of the treaty, which guarantees to the inhabitants the rights of property secured to them; but it was not intended to provide for the particular modes and instrumentalities by which such rights should be ascertained and enforced—these being left to the nation to whose powers they were confided; so that the question is, what has Congress deemed expedient? Now the policy which is so obvious, and which has been acted on by the United States ever since they began to exercise power over the public lands, namely, to give defined limits to grants, may well be supposed to have actuated Congress in 1807. The provisions of that act clearly show, that although Congress intended that the commissioners should adjudge the existence of good titles to lands held under French and Spanish possessors, yet they did not intend that a final legal title, as against the United States, should be made to vague grants, until their bounds had *been ascertained by the means there designated, and the particular tract defined by survey.*

"Congress might have said, as was done in case of the St. Louis town lots and out-lots, by the act of 1812, that each man should own what he had lawfully possessed under the former government; and if Congress had done so, then the question would have been, in this instance, a matter of fact, to be tried by a jury, as to what the plaintiff did formerly possess, and consequently own. But Congress having said, by the act of 1807, that he *shall be confirmed in what shall be designated by a survey made under the authority of the United States, according to the direction of the board of commissioners, and such direction to survey being a condition which the judgment of confirmation carried along with it, until the survey was made, the plaintiff's title attached to no land, nor could a court of justice ascertain its boundaries,* as this power was reserved to the *executive department of the federal government;* it follows that the legal representative of Brazeau, who brings suit, *had no title at the time it was brought that would support an action of ejectment.*"

The *legal* title to the land in controversy was in the United States on the 10th day of June, 1852, the date of the passage of the act under which the Hannibal & St. Joseph Railroad Company claims title; and also on the 10th day of June, 1853, the date of the filing of the map of the definite location of the line or route of the Hannibal & St. Joseph Railroad in the office of the Commissioner of the General Land Office. After the filing of said map in said office, the *legal* title to the land in controversy under said act, *proprio vigore*, vested in the Hannibal & St. Joseph Railroad Company. Being an even numbered section, and situated within six miles of the road, no survey, selection or other act was necessary to be done to identify or give precision to the grant, or sever it from the maps of Public Lands. All these things were accomplished with mathematical certainty *ipso facto* by the filing of said map of the line or route of the definite location of said road in the office of the Commissioner of the General Land Office. But such is not the case under the act of September the 28th, 1850. No man could point to any specific section or part of a section and say that it came within the purview of the so-called grant. That was left entirely to the judgment and decision of the Secretary of the Interior. No man could tell in advance what specific sections or parts of sections he might adjudge and decide to come within the purview of the so-called grant. Even after he might have made up his judgment and decision and made out "an accurate list and plats of the lands" which he might adjudge and decide to come within the purview of the so-called grant, and transmitted the same to the Governor of the State for his acceptance, the Governor might have declined to accept. By the express terms of said act, the fee simple did not rest in the State until the issuance

of a patent "to the State therefor." There is a vast difference in a legal point of view between the two acts; under the former, the legal title to every even numbered section situated within six miles of the road, remaining unsold or undisposed of at the time of the passage of said act, vested in the Hannibal & St. Joseph Railroad Company as soon as it filed the map of the definite location of the line or route of its road. But it is not so under the latter act. The *legal* title is expressly withheld until the issuance of a patent. The title of the State under the latter act attached to no specific tract of land at least, until it had been listed, platted, transmitted to the Governor of the State and *accepted* by him. This construction of the respective acts is fully sustained by the decision of this court in the case of Foley vs. Harrison *et al*, (15 How. on p. 447.) Says Justice McLean in delivering the opinion of the court:

"The act of 1841 authorized the State to enter the lands, where surveys had been executed and the lands were open to entry, under the acts of Congress. The State of Louisiana acted within its powers, in issuing warrants, and establishing land offices, as a means of disposing of the lands, But it had not *the power to convey the fee, as it had not been parted with by the general government.* The words of the act of 1841, are 'that there *shall be granted* to each State,' not that there is *hereby granted.* The *words import, that a grant shall be made in future.*" Lessieur et al. *v.* Price, 12 ~~Peters, 75~~.

"It could not have been the intention of the government, to relinquish the exercise of power over the public lands, that might be located by the State. *The same system was to be observed in the entry of lands by the State as by individuals, except the payment of the money; and this was necessary to give effect to the act, and to prevent conflicting entries.*"

Another position supported by this case, is that the judgment and decision of the Secretary of the Interior is *final.* Says Justice McLean, on p. 448:

"As this decision was made by a special tribunal, with full powers to examine and decide; and, as there is no provision for an appeal to any other jurisdiction, the decision is final within the law."

That the State of Missouri acquired neither a *jus ad rem*, nor a *jus in re* to any specific tract of land, under the act of September the 28th, 1850, until it had been listed, platted, transmitted to the Governor of the State, accepted by him and "a patent" "issued to the State therefor" is clearly and fully shown by the decision of this court in the case of Carondelet vs. St. Louis, (1 Black, on p. 189.) Says Justice Catron in delivering the opinion of the court:

"Had the out-boundary line been run according to the reserved power in the act of 1812, the boundary of the common would have been established, there being no other claims to be included. *Until a survey was made on the west and*

south, the villagers had no title to the common on which they could sue, because their grant attached to no land, nor could a court of equity establish a boundary. This court so held in the case of West vs. Cochran, (17 How., 416.) The case is different, under the act of 1812, as to town lots and out-lots, as there stated. Such lots, and the possession of them, could be shown and identified, as matter of evidence. Ib., p. 418. The proposition is, of necessity, true, *as respects all grants of specific tracts of land. If there be no boundary, the grant is vague, and cannot be identified, and the grantee takes nothing.* The *survey here was the completion of the title*, although it succeeded the act of granting the land. It defined the grant."

Again that the listing, platting, transmitting to the Governor of the State, accepting the same by him and issuing a patent to the State therefor, are all conditions *precedent* to the vesting of the fee simple to said lands in the State is fully shown in the following paragraph in the same opinion:

"This being the condition of the Carondelet common south of the village, a survey and line-marks entered into the title, AND WERE NECESSARY TO CREATE ONE; as to the survey, the land granted must attach."

That the foregoing is the correct construction of said acts is further shown by the following decisions: Glasgow *et al* vs. Hortiz *et al*, 1 Black, 595; Singleton vs. Touchard, 1 *id.* 342.

Viewing the act of September the 28th. 1850, in the light of the foregoing decisions of this court, and it cannot possibly be regarded as a grant *in presenti.* At best it was only an overture to make a vague undefined grant, which did not, and could not, attach to any *specific* tract of land, until the political or executive department of the Government of the United States had acted on the subject matter in conformity with the provisions of said act. If it had been a grant *in presenti*, then the fee simple would have passed *proprio vigore.* But Congress not intending it to operate *proprio vigore* as a grant *in presenti*, expressly provided for the issuing of a patent, and the effect of that patent is declared to "vest in the said State," "*the fee simple* to said lands." The implication then is as strong as any express words could make it, that the fee simple to said lands did not vest in said State until the issuance of a patent therefor. It was highly necessary that the fee simple to said lands should be retained in the United States under this so-called vague undefined grant. If it had not been retained, and the States had been allowed to select such lands as their agents and interested parties had been of *opinion* were swamp and overflowed on the 28th day of September, 1850, the land department of the United States could not have known what lands to sell or otherwise dispose of, and what not to sell or dispose of. There would more conflicts and litigation have

grown out of such a state of affairs between the purchasers under the States and the purchasers under the United States than grew out of the treaty of April the 30th, 1803, by which the Louisiana territory was ceded to the United States, and their name is legion! They are not all settled yet, although two generations have passed since the cession of that territory. Several cases are now before this court growing out of that treaty. The case of Maguire vs. Tyler has been thrice before the Supreme Court of Missouri, (25 Mo. 484; S. C. 30 *id.* 202; S. C. 40 *id.* 406;) before this court once, (1 Black 195,) and is now before this court a second time. That terse old maxim of the common law *ut sit litium finis interest rei publicae* is founded on the wisdom and experience of ages. "Time is wiser than all the writs in the world," says Lord Coke. Nearly half a century had passed after the cession of the Louisiana territory to the United States when Congress passed the act of September the 28th, 1850.—Knowing that men would differ in their judgment as to what were swamp and overflowed lands, it with great wisdom confided the settling of that question to the judgment and decision of one mind, and expressly withheld the legal title until that question should be settled. If it had been left to the States to adjudge and decide what were swamp and overflowed lands then, so far as the title to the undisposed of public lands was concerned, "chaos would have come again." There would have been a repetition of all the strife, conflict and litigation of a Louisiana treaty, aggravated ten fold. This very state of affairs would be produced if the act of September the 28th, 1850, should be construed to be a grant *in presenti*, vesting the title in the States *proprio vigore*. On the other hand, if it shall be construed to be a mere *overture* on the part of the United States to make a vague undefined grant, the execution of which shall be left entirely to the Secretary of the Interior, then there can be, and will be, none of the strife, conflict and litigation which would inevitably grow out of the other construction. Better for the peace and quiet of society that no donation of the swamp and overflowed lands should ever have been made if the former construction be given to said act. What was intended by Congress to be a blessing, would, under such a construction, prove a positive curse. It follows, then, that Congress not only had a reason, but the very best reason for confiding the execution of said act to the Secretary of the Interior and withholding the fee simple to said lands

until he had judged and decided the question what lands came within the purview of said act. The facts as developed by the record in this very case, show the great wisdom of confiding the execution of said act to one man and withholding the title until he had judged and decided the matter. The witnesses for the plaintiff did not consider the land in controversy swamp or overflowed. The witnesses for the defendant did. The court took sides with the defendant's witnesses; and so the case was decided. Concede that the witnesses were honest in their opinions.—Here then was a *diversity* in this very case. This diversity illustrates with great force what the practical working of the construction given to said act by the circuit court of Macon county, Missouri, would be. Hence not only the propriety but necessity of the United States retaining the full and entire control of the whole matter. (Foley vs. Harrison, 15 How, on p. 447.)

Suppose the United States had sold a quarter section of land lying in the *odd* numbered section adjoining the land in controversy after the passage of said act, and issued a patent to the purchaser therefor. This patent would be *prima facie* evidence of title in the purchaser. Then suppose that the State of Missouri or her grantee were to claim that it was *swamp* land in fact on the 28th day of September, 1850, and claim it under the so-called swamp land grant, and in an action of ejectment the grantee claiming under the State should bring the same witnesses that the defendant adduced in this case, to prove the fact, that the land sold and patented by the United States to a bona fide purchaser for value, was swamp land in fact, on the 28th day of September, 1850, under the construction given to said act by the circuit court of Macon county, Missouri, the grantee claiming under the State would be regarded as having the elder and paramount title, and hence entitled to said quarter section of land. If this construction is to be held as the correct one, then the United States will be at the mercy of any number of land sharks who stand ready to move on the titles of these bona fide purchasers for several hundred thousand acres of land and gobble them up; and neither the unfortunate purchasers nor the United States themselves in all their majesty and power could prevent this gobbling up process. The consequences resulting from such a construction would be appalling to thousands of sturdy pioneers who have invested their all in purchasing a tract of land so as to acquire a home, and on the faith of having

obtained a good title from their Government, have made valuable and lasting improvements on the lands so purchased. Is this picture overdrawn? If not, what is the difference in principle between the case supposed and the case under consideration? Is not the Hannibal & St. Joseph Railroad Company a bona fide purchaser for a valuable consideration, as well as the sturdy pioneer?

In this case there is no charge of fraud, collusion, or mistake. The law will not presume it. Hence the introduction of parol evidence to show the character of the land in controversy, was ignoring the decision of the Secretary of the Interior in a *collateral* proceeding, and treating it as null and void. This ruling of the court at *nisi prius* was a palpable violation of all rules of law. It was substituting the *opinions* of the witnesses and the judgment of the court, for the decision of the Secretary of the Interior, (Minter *et al vs.* Crommelin, 18 How., 87; the United States vs. Peralta *et al.*, 19 *id.* on p. 347; McLeary vs. Silliman, 2 Wheat., 369; McIntyre vs. Wood, 7 Cranch, 504; Delassus vs. the United States, 9 Pet. on p. 134; Lea vs. Polk Co., Copper Co., 21 How., on p. 497; The People vs. Mouran, 5 Denio, 398; The United States vs. Arredondo, 6 Pet. 729; Ross *et al* vs. Reed, 1 Wheat. 482, 487; Bouldin vs. Massie's Heirs, 7 *id.* 122, 149; Jackson vs. Marsh, 6 Cow. 281.)

Admitting for the sake of the argument, that the State did *accept* the donation of swamp and overflowed lands, as required by the act of September the 28th, 1850, before the definite location of the line or route of the Hannibal and St. Joseph Railroad, still such acceptance would only entitle her to such lands as come within the purview of the said act. Her claim would be in the nature of "a float," (Menard's Heirs vs. Massey, 8 How., 309,) until the Secretary of the Interior had made out "an accurate list and plats of said lands." Then the State would have had a *jus ad rem* to the lands embraced in said "list and plats." This inchoate title might then have become a *jus in re* by issuing a patent therefor. But prior to the Secretary of the Interior making out such "list and plats," no person knew what lands were swamp and overflowed within the purview of the law. At common law the grant would be void for uncertainty. (Buyck *et al.* vs. The United States, 15 Pet., 223; The United States vs. Forbes, *id.* 173; 4 Bacon Tit. Grant, 81; The United States vs. Miranda, 16 Pet., 160.)

VII. The State of Missouri, under the act of September the 28th, 1850, is a mere volunteer. The United States does not get any *quid pro quo* for the swamp and overflowed lands donated, or offered to be donated. Even if the overture of said lands had been accepted, the compact would be *nudum pactum*, and hence not binding on the United States. Under said act, the fee simple did not vest in the State until a patent was issued. No patent ever was issued for the land in controversy. So long as the fee remained in the United States, they could grant said lands to the State for any other purpose, and if the State accepted such grant, its faith would by such acceptance be pledged to carry out such grant. No court of law would render a judgment for a breach of the compact to issue a patent for the swamp and overflowed lands, for want of an *adequate consideration.* Nor would a court of equity decree a specific performance of such compact for the same reason. (1 Mad., ch. 411-12; Minturn vs. Seymour, 4 John., Ch. R. 497.)

VIII. Even if it shall be considered that the compact had been fully entered into between the United States and the State of Missouri by which the United States agreed to make a patent to the land in controversy, still the title was in the United States at the time of the definite location of the Hannibal and St. Joseph Railroad, and hence the United States could grant or withhold the title at pleasure, so long as it remained executory. (Menard's Heirs vs. Massey, 8 How., 303.)

IX. "Grants made by a legislature are not warranties; and the rule universally applied in determining their effect is, that if the *thing granted was not in the grantor at the time of the grant,* no estate passes to the grantee." (Per Justice Clifford in the case of Rice vs. Railroad Company, 1 Black, on p. 374.) Now as the State had no title to the land in controversy at the time of its pretended grant to the county of Macon by the act of March the 4th, 1851, no subsequent acquisition of the title by the State would pass it by said grant to the county of Macon.

X. The State took the land in controversy in trust for a particular purpose and with the express agreement that it should "be held by the State of Missouri for the use and purpose aforesaid," *i. e.* "for the purpose of aiding in making the railroads aforesaid," "and that the same *shall be applied to no other purpose whatsoever.*" (2nd §, act June 10th, 1852.) Says Justice Clifford in delivering the opinion of this Court in the case of Rice vs. Railroad Company, (1 Black, on p. 376), "Beyond question, therefore, the lands were to be held by the Territory

only for the use and purpose of constructing the railroad described in the act, and they were to be applied to that purpose and no other."

Again on p. 378 *id.* he says: "But the word grant is not a technical word like the word enfeoff, and although if used broadly, without limitation or restriction, it would carry an estate or interest in the thing granted, still it may be used in a more restricted sense, and be so limited that the grantee will take but a mere naked trust or power to dispose of the thing granted, and to apply the proceeds arising out of it to the use and benefit of the grantor."

The State accepted and executed this trust for a *valuable* "consideration" as has already been shown. Even if she had had a valid right to the land in controversy under the act of September the 28th, 1850, by said acceptance and execution of said trust, is forever *estopped* from claiming it. The estoppel operates on all privies in estate claiming under her. (Trustees of Vincennes University vs. the State of Indiana, 14 How. 269.) Even if the State did not have the title at the time of accepting the trust, if she afterwards acquired it by agreeing to execute the trust for a *valuable* "consideration," as she did by the act of September the 20th, 1852, she and the defendant claiming under her as a privy, are estopped from setting up a claim under the act of September the 28th, 1850. An estoppel works upon the land, and binds an after acquired title as between parties and privies. (V. Rensselaer vs. Kearney *et al.* 11 How. 298; Dundas *et al.* vs. Hitchcock, 12 *id.* 257; 21 *id.* 228; 12 Mo. 137; Crews vs. Burcham, 1 Black, 357.)

The defendant is estopped on another ground from claiming title to the land in controversy. By an act of the General Assembly of the State of Missouri passed on the 8th of March, 1849, (Sep. acts of 1849 p. 192,) the State solemnly pledged her faith to dedicate the "alternate sections of the public lands, to the extent of six sections on each side of the said contemplated railroad," *i. e.* the Hannibal & St. Joseph Railroad, "from one end to the other" whenever the Congress of the United States have donated the same. As the land in controversy is situated within six sections of one side of the Hannibal & St. Joseph Railroad, and Congress, on the 10th of June, 1852, did make the anticipated donation of the public lands, the State would be estopped by said act of its own General Assembly from setting up any title to said land; and the defendant claiming under the State is equally estopped.

But if the State and her grantee be not technically estopped from claiming said land under the act of September the 28th, 1850, then it is claimed, that she *waived* her right to said land under the latter act, when she re-granted, for a *valuable* "consideration," "every alternate section of land, designated by even numbers, for six sections in width on each side of said road," and declared that the same "shall vest in full and complete title, in the Hannibal & St. Joseph Railroad Company, for the uses and purposes, and subject to the conditions, reversions and provisions set forth and contained in said act of Congress." (The State of Minnesota vs. Bachelder, 1 Wallace, 109; Dundas *et al.* vs. Hitchcock, 12 How. 298.) This grant was duly *accepted* by the Hannibal & St. Joseph Railroad Company, and hence it became a binding contract between the State and the Company, irrevocable without consent.

XI. The land in controversy does not come within the purview of the act of August the 3d, 1854. It only applies where the law by which the title is acquired "does not convey the fee simple title of such lands, or required patents to be issued therefor." The act of June the 10th, 1852, did convey the fee simple title and did not require a patent to be issued therefor.

XII. The land in controversy was not *confirmed* to the State under the operation of the act of March the 3d, 1857. (11 vol. U. S. stats. at large, p. 251.) That act only applied to the selection of swamp and overflowed lands "*heretofore made and reported to the Commissioner of the General Land Office, so far as the same shall remain vacant and unappropriated.*" We have shown that it had been appropriated under the act of June the 10th, 1852.

XIII. The Hannibal & St. Joseph Railroad Company acquired the first title, and that the legal title under the operation of the act of Congress, June the 10th, 1852; and this suit being an action at law, the list of land certified to the company is at least prima facie evidence to show title; and the defendant in error failing to show a paramount title, the plaintiff in error was entitled to recover. (Fenn vs. Holme, 21 How. 481; Hooper vs. Schriver, 23 *id.* 235; Clagett vs. Kilbourne, 1 Black, 346; West vs. Cochran, 17 How. 416; Wilcox vs. Jackson, 13 Pet. 517; Jackson vs. Ingraham, 4 John. 163; Jackson ex dem, Mancius vs. Lawton, 10 John. 23; 12 *id.* 77; Robbins *et al.* vs. Eckler, 36 Mo. 506; McGill vs. Somers *et al.* 15 *id.* 87; Mitchell vs. Parker, 25 *id.* 34.)

XIV. But it is claimed for the defendant, that as the act under which he claims is *older* than the act under which the plaintiff claims, that when he establishes the *fact*, to the satisfaction of a jury of his peers of Macon county, Missouri, that the land in controversy was swamp or overflowed on the 28th day of September, 1850; that his title relates back to that date, and thereby becomes paramount to the plaintiff's title. The law is well settled that the doctrine of relation does not have any such effect. It is not allowed to divest a legal title fairly acquired. (Ledoux *et al.* vs. Black *et al.* 18 How. 473 and authorities there cited; Menard's heirs vs. Massey, 8 *id.* 293; Les Bois vs. Bramell, 4 *id.* 447.

The court is respectfully referred to Lester's Land Laws for the instructions given, and rulings and views of the Land Department on the questions involved in this case. See pp. 543, 534–5, 521, 507, 551, 552, 544–5, 548–9, 512, 530, 533, 537, 541, 523; letter of Hon. J. M. Edmonds, Commissioner of the General Land Office, to Gov. Kirkwood, dated June 3d, 1862; letter of the same to the Secretary of the Interior, dated October 1st, 1861; Senate Documents 1851–2, vol. 3, p 18.

The true point of inquiry—the point upon which this case turns—is, which of these titles become first vested? The reason is that as between two such titles, that which became first vested is the better title.

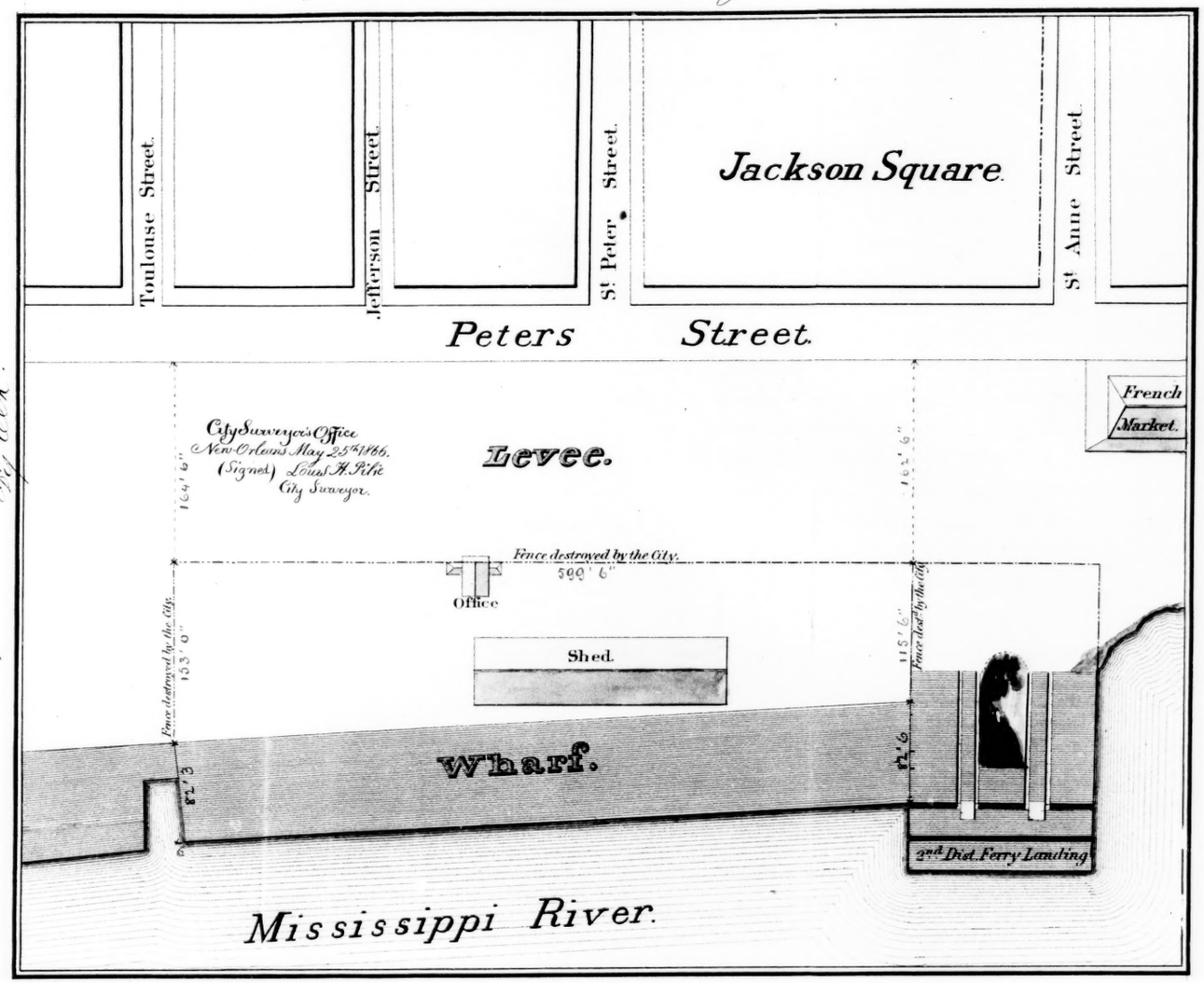
JAMES CARR.

(With whom is SIDNEY BARTLETT and W. P. HALL.)

Of counsel for plaintiff in error.

No. 384 { The City of New Orleans, Pltffs in Err.
vs
Theo. J. Marie Strubel & Co } Page 56.

No. 3852
U.S. Circuit Court
Filed by Deputy
Aug 3rd 1866
Signed J. H. Ward
Dep. Clk.



No. 6

Plan O.

3852.
U.S. Circuit Court.
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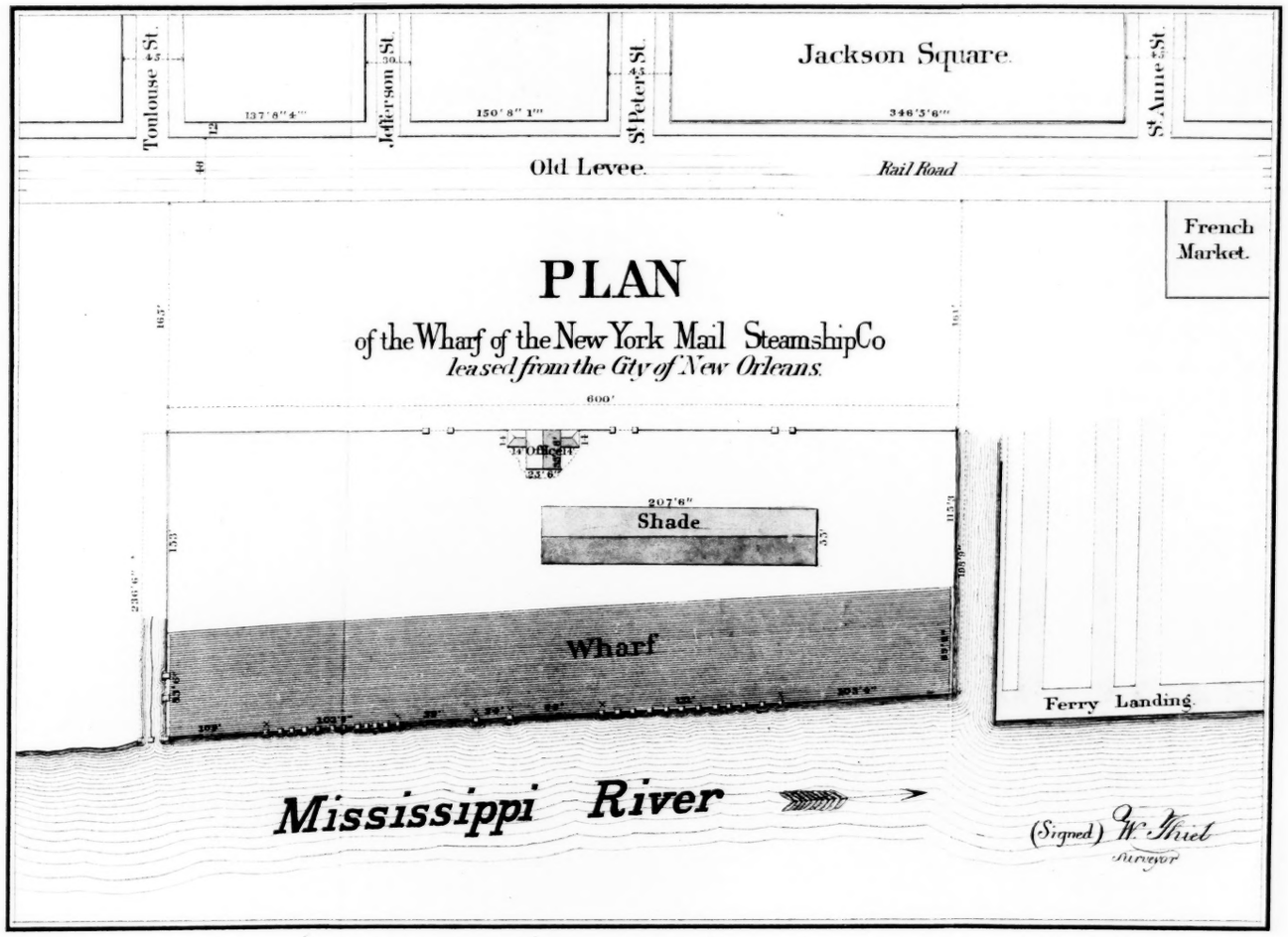
(Signed) F. B. Vinot
Clerk.



No. 389 { The City of New Orleans Plaintiffs
The New York Mail Steamship Co

Page 68.